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Copyright and the Future of Digital Culture: Application of the First Sale Doctrine to Digital Copyrighted Works

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Copyright and the Future of Digital Culture:
Application of the First Sale Doctrine to Digital Copyrighted Works

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Dedication

I dedicate this dissertation to my respectable parents.

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Copyright and the Future of Digital Culture: Application of the First Sale Doctrine to Digital Copyrighted Works

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The premise of this dissertation is that copyright law should exist to benefit primarily the public not the copyright holder. The current licensing schemes and copyright protection that favor copyright holders are viewed as running counter to the primary purpose of copyright legislation. Increasingly, the U.S. is moving toward a society where "owning" cultural works is not allowed and users of digital creative works are becoming mere licensees locked into restrictive licensing agreements imposed by copyright holders. The current copyright law has also failed to keep up with new ways that consumers of digital content interact with cultural works in their daily lives.

This dissertation questions in particular how the first sale doctrine, one of the "safety valves" within the copyright system, can and should play a key role both in curbing structural tendencies toward overprotecting copyright and in re-establishing the fundamental rights of consumers. The first sale doctrine serves the important purpose of extinguishing the copyright owner's right to control the subsequent disposition of that particular copy after its initial distribution.

The purpose of this dissertation is twofold. First, this study seeks to move beyond

the existing knowledge of the origin, application, and development of the first sale doctrine by providing an in-depth look at the ebook ecosystem where the doctrine plays out in conjunction with other socio-cultural factors that have shaped the current political and economic conditions and copyright regime with regard to ebooks. Second, drawing on the notion of cultural democracy rooted in democratic copyright theories, this study critically explores the doctrine's ability to further the public's interest in the wide access to and use of copyrighted works in the digital age.

This dissertation is concerned with the implications of cultural democracy in a digital environment, including policy recommendations to reform and update the current copyright legislation. Ultimately, this study develops a framework to protect the rights of digital content consumers by promoting cultural democracy as one of the primary goals of democratic principles that copyright law intends to support.

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Chapter 1: Introduction

Do users really "own" digital content when they buy a digital book, digital music, or computer software? In most contemporary circumstances, the technical answer is no. Most digital works allow copyright owners to choose among several distribution models that favor the licensing model, and licensing in principle does not bestow ownership rights on those who use the "licensed" product. In a time when users are transitioning their use of media products such as books, photographs and music to digital formats, it is logical that they bring many of the expectations cultivated on the basis of those earlier non-digital material content forms to the new digital forms. Buying an ebook results in having a book to read, even if it is on an electronic device. But not actually owning that book does surprise the ebook user. It comes as no surprise that copyright owners who want to extend control over their content choose a licensing model instead of transferring ownership of their works permanently to users. Licensing offers the prospect of permanent control and recurring income. Unfortunately, it also comes at a cost to the broader public and to the shape of public goods everywhere.[1]

[1] Another important issue that digital technologies have brought up is related to copyright law's unclear treatment with regard to temporary reproductions. Even to access or transfer digital works on the Internet, one needs to make "copies" of them on his or her computer's random access memory (RAM) or similar medium, and making temporary copies, under some circumstances, can be interpreted as a violation of the exclusive reproduction right of the copyright owner. It is worth noting that whenever one runs a computer's RAM and other parts of the computer. Those copies are essential in using the program. Lawmakers implemented a provision to prevent computer program users from being subject to copyright liability by owning a copy of a computer program and making another copy of it to use the program. This law is based on the logic that the owner of the copy should have a right to use it (Siy, 2013).

This study seeks to problematize the current copyright regime by exploring the origin, application, and development of the first sale doctrine and its ability to balance the public's interest in the wide access to and use of copyrighted works with the property interest of copyright holders in the digital age. Historically, public interest considerations such as the limited duration of protection, the fair use doctrine, and the first sale doctrine have been the subjects of statutory exceptions and limitations imposed on the copyright owner's exclusive rights. Those considerations are supposed to serve as a "safety valve" preventing the complete self-interest of the copyright holder from imposing an undue burden on users' freedom to access and use copyrighted works. In this, these safety valves are often juxtaposed to arguments regarding the utility of extended copyright protections for incentivizing creators. The ever-increasing copyright protections witnessed in the late 20th century onward necessarily raise questions about the extent to which and in what ways the current copyright system threatens the countervailing interests, namely the public's intellectual freedom, free flow of ideas, creative works and information, and freedom of expression.

Among those statutory considerations, this study focuses on the first sale doctrine, which extinguishes the copyright owner's right to control the subsequent disposition of a particular copy after its initial distribution. I argue that the applicability of the first sale doctrine to digital copyrighted works sheds light on how the public interest can play a key role both in curbing structural tendencies of over-protection of copyright and in re-establishing the fundamental rights of consumers. The matter of the rights of consumers is a critical discursive and deliberative factor in understanding the

path of the first sale. The specific case of ebooks is used to explore an iconic case of digital content that butts up against centuries-old traditions and values surrounding a prominent way that important ideas and discoveries have circulated. The book and the ebook comprise a lightning rod of sorts to explore the limitations and potentials of copyright to contribute to society as it was meant to.

The original intent of copyright is to carve out an ecology where the creation and use of informational and cultural works are promoted (Litman, 2010). However, the dramatic expansion of intellectual property rights, in general, and copyright, in particular, raises questions about where we stand now. There is a growing consensus that the current copyright system has put too much power into the hands of intermediaries that are located between the creators and users of copyrighted works (Gillespie, 2007; Litman, 2010). Many scholars have questioned the legitimacy of this ever-increasing concentration and imbalance, arguing that modern copyright law is failing to achieve its original purposes by allowing copyright holders to inhibit scientific and technological progress (Boyle, 1996, 2008; Gillespie, 2007; Lessig, 2006, 2008; Litman, 2010; Netanel, 2008; Postigo, 2012; Vaidhyanathan, 2001). From the consumers' side, there has been a growing awareness regarding the failing of the copyright system. For example, the Consumer Electronics Association issued a Declaration of Innovation Independence in 2005 that reads:

> For too long, the content community has been allowed to define the terms of the IP debate. Today we reassert our independence. We reassert our independence from the content community's stranglehold on determining

> the language of the debate. We reassert our independence to counter their efforts to inhibit the democratization of creativity enabled by digital technology. And we reassert our independence to ensure that legal activities conducted by consumers remain legal and are not inaccurately labeled as "piracy."[2]

However, to date, too little attention has been paid to how the current licensing regime inhibits users' rights through restrictive agreements. Compared to their leverage over physical copyrighted works, users' leverage is only mediocre over lawfully purchased digital works. They cannot resell, rent, lease, or lend copyrighted digital works despite having lawfully purchased them. I argue that the applicability of the first sale doctrine to digital copyrighted works is closely related to public rights with respect to referent properties and more broadly to the shaping of digital culture.

To advance our understanding of the first sale doctrine and its applicability to the digital realm, I have chosen, among various digital goods, to focus in this study on ebooks. This is partly because the current development of the ebook ecosystem raises a clear set of questions concerning the mission of libraries, public interest considerations, and efforts to balance competing legitimate interests between copyright holders and users of copyrighted material. "E-books possess immense potential to change the spread of knowledge and education. The public interest in the right to educational and written materials should supersede any attempt by copyright owners to expand their rights beyond the first sale" (McKenzie, 2013, p. 70).

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[2] Available at http://www.ecoustics.com/products/principles-innovation-independence/

This study examines the ecosystem of ebooks at the point where tensions over the first sale doctrine exist. In doing so, this study builds on theoretical accounts of "democratic copyright" (Benkler, 2006; Bracha, 2007, Bracha & Syed, 2014; Coombe, 1991; Elkin-Koren, 1996; Netanel, 1996; Van Houweling, 2005). A democratic approach to copyright law recognizes values and social goals other than economic efficiency. Those social goals include self-determination, political democracy, cultural democracy, and an enriched concept of human welfare (Bracha & Syed, 2014). In this study, I argue that the notion of cultural democracy holds particular significance, especially in today's unbalanced copyright regime, because it raises questions about the balance of power between users of copyrighted works and copyright holders. Cultural democracy is a normative concept that values individuals' opportunities to fulfill their capacities to the fullest and to actively participate in cultural meaning-making processes in an egalitarian manner. That concept views democracy "as developmental, as a matter of the improvement of mankind" (Macpherson, 1973, p. 78) and does not limit its focus to enhanced access to cultural works but rather promotes also more egalitarian access to the means of production and distribution. In sum, the notion of cultural democracy addresses the importance of having a cultural environment that supports democratic values. It can be said that cultural democracy's call for more egalitarian access to and decentralized control over the production and distribution of cultural works is synonymous with values that are much sought by scholars in the political economy of communication (see Golding & Murdock, 1991).

A democratic approach to copyright law can provide room for more sophisticated deliberation about the proper scope of copyright protection. By resurrecting the intent of copyright and restoring the balance between users and the copyright holder, with the help of public interest considerations, we may be better positioned to reform the copyright scheme. Building upon the tradition of democratic copyright theories, I will undertake the task of normative evaluation of current copyright regime with particular focus on the first sale doctrine.

PROBLEMATIZING THE CURRENT COPYRIGHT REGIME

The need to foster creativity and respect for the rights of copyright owners while ensuring the public's access and use of copyrighted works is a value with which most critics can agree. However, modern technologies have raised new concerns related to copyright enforcement, including the ease of pirating copyrighted works, the non-degradation of digital files' quality, the compactness of works in digital form that facilitates easier sharing (Calaba, 2002), and the low marginal cost of reproduction. Even if we acknowledge the need to protect copyright owners' interests, the ability to actually correct an imbalance between protecting their interests and those of copyright users remains a challenge under the current copyright system (Boyle, 1997).

In the U.S., the growing copyright protection evident in the Digital Millennium Copyright Act (DMCA) and other recent laws raises questions about the extent to which and in what ways the current copyright system threatens the public's intellectual freedom, free flow of information, and freedom of expression. In response to those questions,

many scholars and public interest copyright activists are concerned about the current situation where copyright laws are undermining the public's legitimate use and access to cultural works. Some court and policy rulings have fought successfully against the over-protection of copyright (Aufderheide, 2009; Boyle, 1997). For example, the Supreme Court's ruling in *Sony Corp. of America v. Universal City Studios, Inc*. is a good example, as are some more current decisions around fair use definitions and practices. As Aufderheide (2009) aptly notes, successful fair use cases are "all examples not only of attempted intimidation but of fighting back and winning critically important legal precedents that inhibit future bullying" (pp. 189-190). Nevertheless, the small successes in resisting strong copyright are dwarfed by the contemporary magnitude and growing strength of copyright provisions.

The public policy of copyright law should "find a balance between two aspects of the public interest inherent to copyright: copyright as driving creative activity and thus promoting learning for the benefit of the public and exceptions to copyright that offer the widest availability of copyrighted material for the public" (Davies, 2002, p. x). However, this rhetoric of balance has failed to provide solid guidelines for both copyright owners and copyright users. Given this reality, supporters of strong copyright have effectively deployed the metaphor "copyrights are property" in pursuing copyright protection for their intellectual property (Herman, 2008), thus for example framing file-sharing through peer-to-peer networks as "pirating." That framing (i.e., "copyright as property") has been articulated by subsequent policy discussions throughout the eighteenth and nineteenth centuries in both England and the United States (Vaidhyanathan, 2001, p. 11). Alternative

framing of copyright protections, and in particular a frame that valorizes the rights of users or consumers of intellectual property, has struggled.

At the turn of the century, "intellectual property has no corresponding place in popular debate or political understanding" in ways similar to the politics of the environment or of health care reform (Boyle, 1997, p. 113; Samuelson, 2001). When it comes to politics of intellectual property, we still do not have a conceptual map that encompasses relevant issues, and we lack viable coalitions that are unified by shared interests as perceived in various contexts (Boyle, 1997). However, with the dramatic increase of networked connections in the public sphere, things are gradually changing with regard to the politics of intellectual property. Most notably, U.S. society recently witnessed an historical instance of online outrage that killed two anti-piracy bills, SOPA (Stop Online Piracy Act) and PIPA (Protect Intellectual Property Act). According to the *Los Angeles Times*, 4.5 million people signed Google's petition opposing SOPA (Netburn, 2012). Adding quantitative detail to the politics of copyright, Herman's (2013) study tried to answer the question of "which policy advocates communicate what messages in which media" (p. 355). According to Herman (2013), the copyright debate looked very different depending on the medium through which it was viewed. Herman's research demonstrates that online platforms provide a good venue for strong fair use coalitions. Consequently, new ways to think about copyright are emerging.

A growing body of literature on alternative understanding of contemporary copyright users is emerging (e.g., Caraway, 2012; Condry, 2004; Edwards, Klein, Lee, Moss, & Philip, 2012, 2015; Lessig, 2008; Postigo, 2012; Rutter & Bryce, 2008).

Challenging the dominant representation of copyright users, these studies view users as "social actors whose actions are prompting policy and industry responses vis-à-vis copyright, and who are themselves a product of the historical and social contexts in which copyright discourse emerge" (Edwards et al., 2015, p. 693). Herman (2008) claims that changing the current imbalance between copyright holders and users of copyrighted works can start by correcting the false metaphor that "Copyrights are property," and by polishing counter-metaphors that stress that copyright is a government-granted monopoly. As Reyman (2010) notes, "[a]nalysis of the digital copyright debate makes visible the discursive structures operating in the legal arena of copyright law and identifies spaces where change might be possible" (p. 144).

Based on an analogy with the environmental movement, Boyle (1997) claims that a political economy of intellectual property is needed in order to oppose structural tendencies that over-protect the interests of intellectual property holders. He further promotes the employment of "a set of analytical tools which reveal common interests around which political coalitions can be built" (Boyle, 1997, p. 113). Boyle recommends recognizing the value of the public domain as a fundamental contributor to innovation and culture and seeing potential benefits of openness that can create space where theoretically refined and rhetorically sophisticated arguments can gain strength to stop or reduce over-protection tendencies of contemporary intellectual property law (Boyle, 2008). In a similar vein, Samuelson (2001) also points out the importance of articulating the benefits that an open information movement can bring to society as a whole.

These attempts to reframe the copyright dilemma by contributing metaphors or analogies can be productive, and a growing body of scholarship in media and communication studies has paid greater attention to the politics of copyright. For instance, Gillespie (2007) critically examines the debate over digital rights management (DRM) technologies and its profound implications for the shape of digital culture. He demonstrates that in the debate over copyright in the digital age "what is lost are the venues in which the public interest side of copyright might effectively counterbalance the demands of copyright owners, who can only envision the value of culture through a lens of their own commercial survival and success" (p. 189). Gillespie (2007) advances our understanding of the role of technology in both shaping and being shaped by the law. After tracing the historical development of American copyright law with particular focus on cultural arts such as literature and music, Vaidhyanathan (2001) also shows in what ways "thick" copyright is incompatible with the original intent of and democratic principles of copyright. Both Gillespie (2007) and Vaidhyanathan (2001) built on political economy perspectives in the sense that the main purposes of their works were to lay bare current socio-legal conditions and to show how power relationships among social actors—including technological apparatus—have played a role in shaping copyright laws.

Building on a political economy perspective, Bettig (1996) also persuasively employs two case studies to make his point: (1) the emergence of the cable television industry and its influence on the filmed entertainment industry; and (2) the introduction of the VCR and its impact on the broadcast industry. Cable television and VCRs were

introduced into the marketplace before policy determinations were made about how to govern the use of disruptive communication technologies within the copyright system. Over time, the lack of guiding principles for cable television and VCRs has brought to light an awareness that intervention by the capitalist state has been driven by intraclass struggles among relevant stakeholders, thereby revealing the influence of capital in the legislative policymaking process. Driven by the logic of capital, filmed entertainment copyright owners have exerted their power on the policymaking apparatus so that new communication technologies, which became related markets for the filmed entertainment companies, have folded into the prevailing market structure (Bettig, 1996). Therefore, rules for governing new disruptive technologies were integrated into the dominant market environment. Bettig's work demonstrates that "technological breakthroughs and product innovations, though perhaps originating at the periphery, eventually get incorporated into the core" (p. 100). After addressing the need for a structural analysis of the current copyright system that has failed to maintain a delicate balance between copyright holders and users of copyrighted works, Bettig (1996) concludes that the success of social movements depends on maintaining a focus on a shared goal, rather than dealing with fragmented interests. As Bettig (1996) notes, "Even the most progressive judges do not cast their decisions in a way that disrupts or questions the fundamental social order" (p. 154).

Given that courts are generally reluctant to take an active role in challenging the status quo and shaping society in a new direction through their decisions, persuading lawmakers by presenting to them the public opinion of constituents may be a more

feasible way to change social conditions. Perhaps, much needed copyright reform can be accomplished only by making consumers' voices heard. Exploring the ways the public good or public interest can function as a guiding and penetrating principle embedded in copyright laws can and should shape the debate surrounding digital copyright regime in today's rapidly changing technological environment.

To problematize the current copyright regime and provide policy recommendations for how the first sale doctrine should be understood in the digital era, this study uses a combined theoretical approach. In doing so, this dissertation uses both the legal studies and communication studies literatures to gain a broader and fuller understanding of normative principles related to copyright. First, a positive approach is adopted to describe and disclose various social and political factors that have shaped the current ebook ecosystem. Additionally, a normative approach is employed to demonstrate how the notion of cultural democracy can provide solid rationales for reforming copyright law. Relying upon a democratic approach to copyright, as discussed earlier, offers a normative vision that can guide the shaping of the digital culture. I argue that by combining the two frameworks the question of the future of the first sale doctrine can be usefully addressed through a holistic analysis of its implications.

PURPOSE AND SIGNIFICANCE OF THE DISSERTATION

The purpose of this dissertation is twofold. First, this study seeks to move beyond the existing knowledge of the origin, application, and development of the first sale

doctrine by providing an in-depth look that examines one specific domain, ebooks, where the doctrine plays out. Second, this study critically explores the doctrine's ability to balance the public's interest in the wide access to and use of copyrighted works that bear property interests of copyright holders in the digital age. In this, it considers how the doctrine's principles are favorable for citizens and consumers. Ultimately, this study proposes policy recommendations on the future of the first sale doctrine as a vehicle for improving copyright functions. More than a decade ago, the Copyright Office took a wait-and-see approach to the application of the first sale doctrine to digital copyrighted works. This might, at that time, have been a reasonable decision. However, we are now at a crossroads in the evolution of digital culture, giving rise to the need to reevaluate the role of the doctrine on the future of digital culture.

While the literature on the applicability of the first sale doctrine to digital copyrighted works has increased in recent years, little is known about how the first sale doctrine operates or can operate in a given specific domain such as the ebook market. This study, therefore, seeks to address that gap in the literature. From a theoretical perspective, democratic theory provides a framing lens. By applying normative values and social goals that have been articulated by democratic copyright theorists to a legal conundrum surrounding the applicability of the first sale doctrine to digital works, this study seeks to advance the explanatory power of "democratic" copyright. This study develops a helpful theoretical framework by locating in cultural democracy a primary goal that should be sought through copyright's principles. In this, both the legal studies

and communication studies literatures provide pertinent perspectives that have not yet been in conversation with each other. This dissertation seeks to use both literatures in order to blend an understanding of normative principles with an understanding of the nature of ownership of and participation in making content in the digital era.

RESEARCH QUESTIONS

The literature on the first sale doctrine and its applicability to digital copyrighted works initiates a discussion of the current status and history of the doctrine. However, as noted above, it falls short of providing a detailed and clear understanding of the ways in which the first sale doctrine in the digital age applies to different domains of copyrighted works. Most of the previous studies on digital first sale doctrine lack a coherent and adequately employed theoretical framework. To fill those academic lacunas, the following research questions will be addressed in this study.

1) How has the first sale doctrine been understood in the past by U.S. courts and Congress?

2) How does or might the first sale doctrine function as a safety valve that balances the public's interest in wide access to and use of copyrighted works with those of the copyright holders?

3) What does it mean to "own" a digital copy of copyrighted works, and how are various digital environments recreating the idea of owning copyrighted material?

- What political and social factors have shaped the current economic conditions and copyright regime with regard to ebooks?

- How was the ability of the first sale doctrine to achieve its purpose changed in the new media environment?

4) How does the notion of cultural democracy apply to the resale of copyrighted material in digital form, and what implications does the concept have for digital content consumers?

5) What conclusions can and should be drawn about the necessity of applying the first sale doctrine to digital copies of copyrighted works?

NOTE ON METHODOLOGY

In legal scholarship, there are two types of legal theory (Vermeule, 2008). One is positive theory and the other is normative theory. Positive theory can be descriptive (or doctrinal), explanatory, or predictive. In other words, positive legal theory seeks to explain what the law is about and why the law is that way as well as how the law affects society. Describing statutory provisions in question, providing an explanation of various sociopolitical or economic factors that have shaped current conditions, and predicting future conditions based on the understanding of where we stand now are examples of main tasks positive legal theorists are supposed to address. By comparison, normative legal theory evaluates the desirability of the law and seeks to answer, "what the law ought to be" (Hart, 1958, p. 606). In other words, normative theory values two arguments:

"claims about the best means to adopt, given stipulated ends, and claims about what ends it would be good to adopt" (Vermeule, 2008, p. 390).

To address research questions posed in this study, I combine positive and normative theories in the context of digital copyright. First of all, I lay out the relevant legal principles and statutes relating to the first sale doctrine. Then, I seek to unpack socio-technical considerations and social interactions among social actors that produced the particular law. These positive speculations of the current copyright regime with regard to ebooks are undertaken based on Lessig's (2006) theory of four modalities of what he calls regulation.[3] In this study, the positive analysis is undertaken to provide a basis for normative articulations of the current copyright regime. As May (2003) points out, critical theorists do not take for granted the power relations among social institutions and actors; rather they make an effort to understand underlying conditions and factors that led to present manifestations.

In sum, the positive analysis of the current copyright system surrounding the ecosystem of the ebook is complemented by normative evaluations that question and challenge the current copyright regime. Democratic copyright theorists pay attention to balancing competing interests between copyright holders and users of copyrighted works since they consider copyright as a tool for realizing normative ideals, such as "cultural democracy" and individual autonomy. By contrast, positive theorists, such as political economists, are concerned about the ways in which social, political, and economic

[3] Lessig's four modalities (i.e., the law, the market, architecture, and social norms) regulate individuals' behaviors both online and offline. Lessig (2006) argues that changes in one modality can cause changes in the other modalities. Therefore, it is important to consider all the four modalities collectively.

resources are distributed and the effects of structural and economic factors on cultural and political expression (Stein, 1997). For example, among various positive approaches, political economy is particularly concerned about "the relationship between structural determination and human agency" (Bettig, 1996, p. 6). The positive mode of the political economy can be complemented by normative evaluations when questioning and challenging the current copyright regime. It is sometimes difficult to draw a clear distinction between positive and normative theorists. This is because normative theorists make arguments based on positive speculations and positive theorists also pay attention to normative values. With that in mind, this study evaluates social outcomes and explores what conditions are needed to mobilize democratic principles of copyright.

In conducting normative theorizing based on positive speculations, this study examines the legal, sociopolitical, and historical variables that contribute to the creation and development of the current copyright regime. In conducting legal research that tackles problems in common law countries, it is important to understand the concept of *stare decisis*. *Stare decisis* refers to the principle that judges are supposed to follow precedent when making a decision with regard to cases with similar facts.[4] Therefore, in common law countries, which includes the United States, case analysis has been widely used to conduct legal analysis under the assumption that "case law develops rationally so that one may trace the logical connection between one case and the next" (Goldman & Jahnige, 1976, p. 157). This study also analyzes legal cases pertaining to the first sale doctrine and its application to digital copyrighted works. Both primary and secondary

[4] See Black's Law Dictionary

legal sources are collected and analyzed in this study, with a lens drawn from the democratic theory of copyright. Primary sources include statutes, Congressional hearings, court decisions, administrative materials, and other documentary evidence used in cases. Secondary sources include media reports on the first sale doctrine, treaties, law review articles, and media journals. In addition, this study assembles an historical approach to legislative history.

CHAPTER OUTLINES

This dissertation raises questions as to whether the current copyright regime that regulates ownership of digital content comports to the purpose of copyright law. Chapter 2 begins by reviewing the relevant theoretical justifications for copyright and democratic copyright theories. The literature on the applicability of the first sale doctrine to copyrighted works in digital form is then surveyed. Finally, Chapter 2 addresses literature on the ownership of digital content in the context of growing tension between copyright holders and copy owners.

Chapter 3 seeks to better understand the origin and historical trajectory of the first sale doctrine by examining primary and secondary historical sources. After the U.S. Supreme Court's decision of *Bobbs-Merrill Co*. v. *Straus* in 1908, the first sale doctrine became law. In 1909, Congress codified the doctrine, and scholars have ever since come to consider it an important balancing mechanism within copyright law. A survey of legislative history of the doctrine is covered as well as a discussion of how courts have approached the balance between copyright holders and copy owners with regard to

subsequent distribution of copyrighted works after their initial distribution. Chapter 3 also scrutinizes policy rationales and theoretical justifications for the first sale doctrine. Finally, Chapter 3 calls for a cohesive normative framework that can justify the expansion of the first sale doctrine to digital goods.

Chapter 4 examines the shaping of the ebook ecosystem, a topic that has received increased attention from the media. By contrast, what has attracted less attention is how consumers' experience with ebook usage is being limited by various socio-cultural factors, such as restrictive licensing agreements that publishers demand. Chapter 4 seeks to identify socio-cultural constraints associated with Lessig's (2006) four modalities that have shaped the current ecosystem of ebooks. It also seeks to explain how those modalities affect the current political and economic conditions and copyright regime with regard to ebooks. In doing so, particular attention is directed to the role of public libraries in furthering democratic principles, including a discussion of how restrictive agreements are hampering the mission of libraries in the digital age. Drawing on the discussion of "materiality," this chapter also addresses the issue of copy ownership. Ultimately, Chapter 4 presents policy implications for consumers of digital content and provides groundwork for suggesting policy recommendations.

Chapter 5 applies the notion of cultural democracy to the discussion of the digital first sale doctrine, focusing on the case of ebooks. Particular attention is given to the relationship between the notion of cultural democracy and policy rationales of the first sale doctrine. Chapter 5 argues that the concept of cultural democracy can provide a theoretical framework for reestablishing consumer digital rights in the digital age. Based

on the literature of legal studies and communication studies, this chapter seeks to contextualize the notion of cultural democracy with descriptions of how the concept plays out in practice. Chapter 5 also pays particular attention to how the notion of cultural democracy relates to helping public libraries fulfill their mission.

Chapter 6 summarizes the findings, evaluates some of the legal issues discussed in earlier chapters, and addresses whether justification can be put forth to expand the first sale doctrine to digital works. Chapter 6 offers policy recommendations based on conclusions drawn from earlier chapters. This chapter seeks to answer the question of what can and should be done about the future of digital culture in association with the need to balance the rights of copyright holders and copy owners.

Chapter 2: Literature Review

This chapter reviews the relevant theoretical justifications for copyright, one type of intellectual property right, and looks at some of the most important democratic copyright theories. Given that this dissertation explores one specific domain of copyright law, the first sale doctrine, and advocates the doctrine's expansion to digital goods, the literature on the applicability of the first sale doctrine to digital transmissions is surveyed. Finally, this chapter addresses the literature on the relationship between copyright owners and owners of copyrighted works. As Fisher (2001) notes, intellectual property theories carry value in that "[they] can catalyze useful conversations among the various people and institutions responsible for the shaping of the law" (p. 198). This chapter argues that democratic copyright theories, in general, and within cultural democracy, in particular, can and should guide copyright reforms in conjunction with a digital first sale doctrine.

THEORETICAL JUSTIFICATIONS FOR COPYRIGHT AS PROPERTY

Copyright is one type of intellectual property right, and disagreements over the interpretation of copyright law center on different perspectives of the normative concerns that undergird copyright. More specifically, scholars have different views over what constitutes the public interest (welfare) in copyright. Although the concept of public interest does not have a uniform meaning that can be applied to different contexts of

society in an equal manner, the public interest concept has, nevertheless, been critical to the development of U.S. copyright law in that the public interest standard holds out the possibility of benefitting the public (Davies, 2002). Gillespie (2007) claims that both the legislature and the courts have consistently believed the best way to pursue the public interest is by strengthening copyright in relation to cultural expression. However, as Davies (2002) notes, "emphasis on taking the public interest into account may be said to have played a positive role in striking the balance between authors and other right owners and the general public" (p. 99).

With regard to the question of what constitutes the public interest in copyright, scholars have presented various responses. However, those responses can be grouped into two broad opposing categories: arguments for "strong copyright" and arguments against "strong copyright." Those who defend the need for strong copyright believe that seeking to uphold the public interest can be accomplished by maximizing social welfare measured by monetary value (i.e., individuals' willingness and ability to pay). They tend to believe that copyright protection serves "to increase incentives for creative activity" (Fisher, 2001, p. 197). It should be noted that not all economic efficiency-oriented copyright theorists are so-called copyright maximalists. Within the economic efficiency framework, there exists a continuum based on their position on the issue of expanding intellectual property "beyond the minimum necessary to provide authors with an incentive to produce" (Netanel, 1998, p. 28). However, there is little or no debate that rights-based copyright theorists support "strong copyright," in that they justify copyright as a matter of natural right given to the creator of

copyrighted material.

On the contrary, opponents of strong copyright protection (or the so-called access-oriented copyright theorists) argue that the public interest is served by promoting wide dissemination of informational and cultural works throughout society and by increasing access to and use of copyrighted works, while also ensuring a "reasonable" reward for the creators.

Theories of intellectual property have roots in four theoretical homes discussed below.[5] Each argument offers a slightly different rationale for justifying protection for intellectual and creative work. The four theories are: the utilitarian theory, the labor-desert theory, the personality theory, and the social planning theory of intellectual property. Though all the theories are considered to be normative theories, the utilitarian theory and the social planning theory build their theoretical explanations based on speculations of what "consequences" will result from copyright protection. By contrast, the rights-based theories justify copyright as a "natural right" given to the creator of copyright material. The rights-based theories include the labor desert theory and the personality theory of intellectual property. Rights-based theories of intellectual property were developed largely by scholars based in European countries, whereas U.S. scholars have focused mostly on questions of what "consequences" will result from copyright protection and how to interpret welfare within the copyright context.

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[5] Property theories constitute a major component of the literature exploring intellectual work and ownership. Theories of intellectual property are based on property theories. Although some differences exist between tangible and intellectual property, the theories that have been utilized to justify ownership of tangible property generally can be applied to the ownership of intellectual property without too much difficulty (Alexander & Peñalver, 2012).

Utilitarian Theory

Perhaps one of the most popular and commonplace justifications for intellectual property is utilitarianism. Arguments that look to how to create incentives and maximize social welfare and seek economic efficiency constitute the top priority of utilitarianism (Fisher, 2001). In other words, maximizing utility is a top priority in deciding how to shape an intellectual property regime. For instance, when it comes to economic benefits of trademarks, utilitarian benefits include the reduction of consumers' "search costs" and the creation of an incentive for the creators (Landes & Posner, 1987; Fisher, 2001). Those who espouse utilitarianism argue that although trademarks can sometimes be harmful for society, in general, trademarks provide benefits in terms of greater recognition and ease of searchability that outweigh potentially harmful effects and thereby justify the existence of trademarks. From a utilitarian perspective, protecting intellectual property can be justified since it can allow innovators to recapture the costs of innovation. Economists largely rely on this logic and courts have often resorted to this rationale since the concept of aggregated utility (whether it is viable or not) provides a simple and clear guideline for comparisons when compared to other theoretical justifications for intellectual property in general and copyright in particular.

One of utilitarianism's most significant problems is that it oversimplifies the relationship between copyright and social welfare (Alexander & Peñalver, 2012; Meng, 2006).[6] For example, there is no established analytic that can be adapted to measure the

[6] It is often said that utilitarianism cannot take account of economic externalities.

costs and benefits of copyright protection, given the lack of information about the extent to which creative innovations are contingent upon material incentives provided by copyright, and what the social benefits of less protection might be. An empirical study, based on data from U.S. copyright registrations from 1870 through 2006, found there is no clear causal relationship between copyright expansion and an increase in the number of new creative works (Ku, Sun, & Fan, 2009). Rather, Ku et al's (2009) study showed that "the historic long-run growth in new copyrighted works is largely a function of population" (p. 1672) than due to increased protection of copyright. Some commentators have argued that material incentives may not be a determining factor for the production of copyright material (e.g., Benkler, 2006); non-monetary rewards, such as the reputation enjoyed by artistic and scientific innovators, academic tenure, and open source developers' humanitarian purposes, promote the creation of informational and cultural products, regardless of economic incentives. The existence of other non-monetary motives complicates the question of the extent to which creators' entitlements should be extended. Prioritizing a list of social welfare factors is another problem that utilitarianism does not address well. As Fisher (2001) notes, the theory defines social welfare too narrowly. Some argue that the contemporary trend of overinvestment in intellectual property protections as opposed to education, community activism, and primary research is problematic (Fisher, 2001; Sunder, 2012). Finally, granting generous incentives can lead to "rent seeking" behavior among corporations aiming to simply acquire intellectual property rights (Fisher, 2001) rather than engaging in creative activity themselves.

The Labor-Desert Theory

A second approach proposes that "a person who labors upon resources that are either unowned or 'held in common' has a natural property right to the fruits of his or her efforts" (Fisher, 2001, p. 170). According to this theory, individuals are entitled to claim their rights over intellectual works they generate because they endeavor to create them. This approach draws inspiration from the writings of John Locke (Alexander & Peñalver, 2012), who argued that a person's ownership of her labor is a "natural right" that exists regardless of the existence and nature of governments (Christman, 1994). This approach claims that the author has a natural right in his or her work because of the labor the individual devoted to create the work. Thus, the notion of labor mixing[7] is a critical factor in determining the establishment of a property right (Christman, 1994). Ploman and Hamilton (1980) claim that "John Locke's attempt to shift the rights of [property] from a statutory right to a naturally given right meant in practical terms a shift of the right from the publisher to the author" (p. 17). According to Locke's "proviso"—the proposition that "a person may legitimately acquire property rights by mixing his labor with resources held 'in common' only if, after the acquisition, 'there is enough and as good left in common for others'" (Fisher, 2001, p. 170)- one's appropriation can only be justified if others are no worse off by his or her appropriation. This is of course particularly appropriate to intellectual endeavors.

[7] The labor-desert theory is also referred to as the labor-mixing theory (See Resnik, 2003).

The labor theory of intellectual property has to confront the ambiguity that originated from Locke's rationale for property rights (Fisher, 2001). Locke did not focus on "intellectual labor" in developing his theoretical justifications for private property, so that the question of what counts as "intellectual labor" needs to be addressed in applying Locke's labor theory to intellectual property. Locke's concept of "the commons" also raises questions about what exactly constitutes intellectual commons among various candidates (Fisher, 2001; Meng, 2006). As Fisher (2001) notes, there are several possibilities (e.g., the "facts," languages, cultural heritage, the set of ideas currently held by at least one individual, the set of "reachable ideas," and the set of all "possible ideas") and depending upon which option we choose, the boundary of an intellectual commons can be differently shaped (p. 186). Another uncertainty that Locke's labor theory raises is captured by Nozick's rhetorical question: "If I pour my can of tomato juice into the ocean, do I own the ocean?" (cited in Fisher, 2001, p. 188). This quote illustrates the difficulty of determining an appropriate level of appropriation based on an individual's devoted labor to the establishment of the property. Consider recent legal battles between Apple and Samsung on mobile device functionalities. Recently, each company filed more than 40 lawsuits about patent, each arguing that the other had stolen some of its own features (Chowdhry, 2014). It is not difficult to find similar cases in contemporary society because many new creations are built on preexisting works. Also, some critics argue that the labor-desert theory does not provide useful guidance on how to allocate "intellectual credit" among authors who collectively participated in creating creative

works, claiming that "intellectual credit" should be allocated based on the significance of one's contribution (Resnik, 2003).

Personality Theory

Personality theory claims that some fundamental human needs can be satisfied by private property rights (Fisher, 2001). Hughes (1988) points out that one's "persona"—"an individual's public image, including his physical features, mannerisms, and history" deserves legal protection, according to personality theory (p. 340). One derivative of this perspective may be that creators, such as authors and inventors, are entitled to the protection of their works from being mutilated or misattributed (Fisher, 2001).

Personality theory argues that property rights are crucial to the fulfillment of some elementary human rights. This line of thinking, which some trace to the works of Kant and Hegel, has been popular in European countries. Hegel (1896/1996) addressed the importance of individuals' free will and argued that property is essential to externalize the will embodied in objects. In other words, property is important because it enables people to express their free will. As Alexander and Peñalver (2012) note, in Hegel's view, "[a] person is a subject who self-consciously realizes freedom by realizing her needs and wants as chosen rather than given" (p. 59).

Drahos (1996) claims that Hegelian theory does not provide a good justification for differentiating between physical objects and intellectual works, failing to address the question of why creators should be entitled to enjoy special entitlements for their creative works where the individual's personality is embodied. Following Drahos's understanding

of Hegel, Meng (2006) also argues that in Hegel's view, "property is the means for the development of personality rather than the receptacle of personality" (p. 18). As Meng (2006) notes, "Hegel considers the state not as an opposite force against individual freedom but as representing the highest form of freedom an individual can attain" (p. 19) and he did not advocate the state's active role as the protector of private property rights. Although Hegel recognized the importance of property in the development of one's self, he believed that the state should be a guardian of "the ethical life of the community," which people are expected to participate in to reach the highest form of freedom, rather than viewing property as the ultimate goal of individual will (Meng, 2006, p. 20).

Social Planning Theory

The last of the four categories regarding justification for intellectual property is called social planning theory (also known as human flourishing theory). This theory does not have a unified name yet and it is less well recognized than the other justifications discussed above. However, a growing body of scholarship on democratic copyright has developed its normative accounts of copyright based on a concept of human welfare.[8] The theoretical groundings of the theory are rooted in the political and moral theories developed by Aristotle and Thomas Aquinas (Alexander & Peñalver, 2012).[9] As

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8 Scholars whose theoretical framework is rooted in or overlapped with the social planning theory, on one way or another, include: Oren Bracha, Rosemary Coombe, William Fisher, Niva-Elkin-Korean, and Neil Netanel (see Bracha & Syed, 2014; Coombe, 1998; Fisher, 2011; Elkin-Koren, 1996; Netanel, 1996).

9 "For Aristotle, the ultimate end of the good human life is happiness (*eudaimonia*), or flourishing. Every other good is sought because it is part of or leads to happiness, Aristotle argues. Aristotle recognized that there is disagreement about what constitutes happiness (flourishing), and he dismisses several plausible

Alexander and Peñalver (2012) aptly note, "human flourishing depends upon social structures, [and] the communities to which property owners belong may legitimately make demands of them to contribute out of their resources or to share their property in order to sustain those social matrices" (p. 95).[10] In other words, social planning theory emphasizes the significance of meaningful engagement for accomplishing better human welfare. Cohen (2012) notes that "[h]uman flourishing requires not only physical well-being but also psychological and social well-being, including the capacity for cultural and political participation" (p. 223).

The underlying reasoning of participatory-democracy theory is also in line with that of social planning theory in that both theories value governments' role in shaping and constructing a "just and attractive culture." In his essay, *Copyright and a Democratic Civil Society*, Netanel (1996) argues that "an important role of law in a democratic state is to underwrite a robust, democracy-enhancing civil society through a combination of state involvement and private initiative" (p. 345). It should be noted that he also argues that "Too thin a copyright would diminish the incentive for autonomous creative contribution, but a copyright of bloated scope, and one that would treat creative expression as simply another commodity, would stifle expressive diversity and undermine copyright's potential for furthering citizen participation in democratic self-rule" (Netanel, 1996, p.

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candidates, including pleasure. Flourishing is an irreducibly complex concept that is constituted by numerous plural and incommensurable goods…Aquinas built on Aristotle's ethics to further elaborate a concept of property focused on the virtues and human flourishing" (Alexander & Peñalver, 2012, pp. 81-84).

10 Although intellectual property and tangible property are two different realms, the theoretical justifications for tangible property can be applied to intellectual property without too much difficulty (Alexander & Peñalver, 2012).

364). Advocating the necessity of furthering the shared goal of the First Amendment and copyright, such as expressive diversity, Netanel (2008) argues that "copyright must be tailored to serve our fundamental interest in uninhibited, robust, and wide-open debate from diverse and antagonistic sources" (p. 168).

However, social planning theory is not free from criticism. The question of what sort of society we need to try to promote must be answered first. As Fisher (2001) notes, "[m]any of its components—for example, the criterion of distributive justice—have for centuries been the subjects of furious debate among political philosophers" (p. 193). As with the utilitarian perspective of intellectual property, answering the question of what level of protection will be sufficient is an issue that social planning theory needs to handle. As Alexander and Peñalver (2012) aptly note, "utilitarian theory does not provide the basis for criticizing a culture that, say, fails to give due weight to the distribution of access to intellectual property when providing such access would not necessarily happen to maximize utility" (p. 203). Social planning theory allows us to overcome the utilitarian perspective of intellectual property by employing an "objective and pluralistic conception of human well-being" (Alexander & Peñalver, 2012, p. 203).

The rights-based theories have difficulty justifying the first sale doctrine because those theories view creators' copyright as a "natural right" or something intrinsically attached to the creator's personality. In particular, alienability of intellectual property cannot be explained by personality theory that is rooted in the Hegelian view (Alexander & Peñalver, 2012). The two rights-based theories—the labor-desert theory and the personality theory—put copyright owners' rights before those of copy owners.

Additionally, the utilitarian theory values maximizing social welfare by incentivizing creators to create more cultural works thereby making it difficult for supporters of the utilitarian theory to advocate the first sale doctrine because the first sale doctrine denies in part the copyright owner's right to distribute. That denial can be seen as a limitation to the copyright owner's right. On the contrary, democratic copyright theories are supportive of the wider dissemination of cultural works, as well as the use of cultural works by copy owners.

DEMOCRATIC THEORY AND COPYRIGHT

Thus far, I surveyed four theoretical justifications for copyright protection. Here, I pay attention to democratic copyright theories that include the social planning theory discussed above. Normative accounts of democratic copyright sometimes overlap with one another in their philosophical positions, and those theories can be categorized into a several normative frameworks (Bracha & Syed, 2014). After reviewing those normative frameworks rooted in liberal democratic theories, this dissertation adopts cultural democracy as a guiding framework. The notion of cultural democracy is appropriate as a normative foundation for addressing various social relations that occur in the cultural dimension. Liberal democratic theories are based on the notion of self-determination in which individuals' realization of their life choices is valued. Therefore, in terms of copyright issues, relational aspects that regulate stakeholders are becoming more important. As Alexander and Peñalver (2012) argue "although human beings value and strive for autonomy, dependency and interdependency are inescapable aspects of well-

lived lives" (p. 87). Thus, the notion of self-determination needs to be extended to the cultural domain where various forms of self-determination compete. Political democracy takes the notion of self-determination to the political domain where collective decisions are made, but does not extend its *primary* concern to ordinary citizens' participation in cultural meaning-making processes. As Bracha and Syed (2014) note, at some point, "the connection between cultural expression and the subject matter of the formal political process seems too tenuous or intractable" (p. 254). Instead of limiting its primary focus to the collective self-determination related to political issues, cultural democracy positions the notion of individual autonomy within the cultural sphere.

A neoclassical approach to copyright, which is rooted in a utilitarian perspective, has dominated theoretical justifications for copyright and has prioritized an efficiency calculus as an exclusive element in the commitment to maximize social welfare. However, problematizing the neoclassical market paradigm, some scholars have proposed various normative accounts of copyright under the heading of "democratic" theories of copyright. Here, my purpose is not to provide a comprehensive survey of those normative accounts of copyright, but rather to canvas some of the most important theoretical accounts in terms of reestablishing the preferential purpose of copyright in democratic societies and articulating counterarguments to the economic efficiency paradigm.

Democratic theorists consider copyright as something that serves the realization of normative ideals such as individual autonomy and active participation in cultural meaning-making processes. A growing body of scholarship has sought to establish a

connection between democratic theory and copyright (e.g., Benkler, 2006; Bracha, 2007; Bracha & Syed, 2014; Elkin-Koren, 1996; Netanel, 1996, 2008; Sunder, 2012). For example, Netanel (1996) contended that copyright law should adopt a view that "copyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society" (p. 288). In her article, "*Cyberlaw and social change: A democratic approach to copyright law in cyberspace*," Elkin-Koren (1996) also adopted a democratic paradigm that reflects "*the will of the citizens*," defining democracy as a process of "discursive will formation" (p. 225).

One normative account of copyright is self-determination. Benkler (2006) provided an elaborated explanation of this normative value in the context of copyright. He contended that we have to be "the authors of our own life choices in some meaningful sense" (p. 141). It is critical that individuals, in pursuing self-determination or autonomy, are enabled to make a "free choice" among a variety of options (Benkler, 2006). Ideally, individuals' pursuit of self-determination should be free from constraints or manipulations by others. Within this framework, some conditions are also required to enable meaningful self-determination. Conditions that enable a diverse expressive environment include "the capacity to understand and evaluate the options, and the opportunity and means to critically reflect upon and possibly revise one's choices and sense of attractive alternatives" (Bracha & Syed, 2014, p. 251). Benkler (2006) defined commons as "where human agents can act free of the particular constraints required for markets, and where they have some degree of confidence that the resources they need for their plans will be available to them" (p. 144). He concluded that "[a]s new strategies for

the production of information and knowledge are making their outputs available freely for use and continuing innovation by everyone everywhere, the networked information economy can begin to contribute significantly to improvements in human development" (Benkler, 2006, p. 468).

Another normative account of copyright is raised by those who believe that some decisions are collective in nature, influencing society as a whole. This normative account of copyright takes self-determination from the individual level to the collective-level. Netanel (2008) applied this normative framework to the context of copyright. Much like the self-determination framework, this normative framework values freedom of expression with the recognition that free expression is a fundamental condition for the shape of collective self-determination. According to Habermas (1996), under the deliberative model of law, rights are not just spaces reserved for individuals, impervious to any form of intervention. Rather, rights are constituted through a public, deliberative process whereby people participate in collective self-determination. Put differently, rights exist in the abstract yet necessitate specific conditions and contexts where those rights can be exercised in practice. Thus, questions about who shapes the conditions and contexts become important.

Within this framework, to enable meaningful collective self-determination, two conditions should be met: 1) there should be given to each individual of society an equal opportunity to participate in the collective decision-making processes, and 2) the same conditions that are required for free choices should be applied to collective decisions (Bracha & Syed, 2014). Participatory-democratic theorists view property as a changing

set of rights and entitlements that are subject to governmental interventions intended to achieve policy goals (Stein, 2006). They admit that the legal configuration of property rights is largely shaped by lawmakers' evaluation of conflicting interests at stake and their normative framework of social values (Stein, 2006; Streeter, 1996).

The cultural democracy framework considers the notion of self-determination as being within the cultural arenas, whereas the political democracy framework is concerned largely with collective decisions that are more or less directly related to political processes (Bracha & Syed, 2014). The cultural democracy framework recognizes that there exists a boundary between cultural expressions and the subject matter of narrow perception of politics, albeit the line separating them is a hard one to draw (Bracha & Syed, 2014). Netanel (1996) notes, "When taken as a whole…expressive works created for symbolic impact or broad audience appeal must, no less than copyright-supported political analysis, be seen as a vital part of democratic self-governance" (p. 351). However, in the same article, Netanel (1996) acknowledges that "While artistic speech does make a certain contribution to democratic governance, it may be that political speech…has a greater and more direct importance for democratic governance and thus should be treated differently in the First Amendment context" (p. 352). Therefore, it can be said that Neil Netanel's normative accounts are more focused on democratic governance. To contrast and extend the self-determination to the cultural realm, Bracha and Syed (2014) argue that cultural democracy has a commitment to "decentralizing meaning-making power on the grounds of equalizing individuals' effective opportunity to participate in the semiotic shaping of *others*' subjectivity" (p. 24). They also argue it has

a commitment to enabling ample opportunities for individuals to pursue a meaningful self-determination in the cultural realm.

In a similar vein, Coombe (1998) argues that the expanding trajectory of intellectual property law, which confers ever-growing capacity to restrict and control the meaning of ideas, symbols, and cultural artifacts, is detrimental to our society by restricting social interactions and limiting our capacity to engage in cultural sphere. In other words, Coombe (1991) suggests that "intellectual property laws may deprive us of the optimal cultural conditions for dialogic practice" (p. 1866). In any democratic society, facilitating freedom of expression is essential for accomplishing its social goals. Strong copyright can raise a wide range of issues incompatible with the notion of freedom of expression.

Gordon (1993) also argues that the use of certain words is critical in the delivery of a message. Prohibiting people from using certain words when they are critical in terms of delivering an intended message is unduly "violat[ing] the [Lockean] proviso because it interferes with the public's ability to communicate" (p. 1591). The people's right of access to an information commons holds significance today. Given that one's creation of cultural works is a cumulative process, having ample room for derivative works is desirable. As Gordon points out, "inability to use the work of others can stifle free thought and vital interchange" (p. 1535). Her cohesive argument questions whether the "overweening growth in natural law rhetoric" is appropriate, illustrating the importance of maintaining a common heritage that enables people to freely communicate with each other and express themselves (p. 1607).

Strong copyright proponents often rely on the argument that a copyright-protected media industry system can better protect authors' welfare and increase media diversity. However, as noted earlier, it remains unclear whether there is a causal relationship between copyright protection and cultural diversity.[11] Contrary to that argument, under the current system of copyright such issues as lack of diversity in the media market and media concentration have become more prevalent. In this regard, more attention should be given to alternative and more empowering approaches to copyright, such as "commons-based peer production," creative commons, and open sources (Benkler, 2006). Those empowering approaches to copyright promote the sharing of cultural works and support the dissemination of knowledge and creative expression that are in line with values supported by democratic copyright theories.

As Goodrich, Kayal and Tushnet (2013) pointed out, "in the age of copyright overbreadth, it actually becomes hard to see how extending copyright outwards and further and investing it with a broader level of protection actually promotes social welfare" (p. 611). Alternative understandings of the structural relationship between the ever-increasing legal protection of copyright and public access to copyrighted works have been offered by Lawrence Lessig, Siva Vaidhyanathan, and Jessica Litman, among others (Goodrich et al., 2013). In essence, these arguments against strong copyright protection and against the property metaphor embrace various benefits that free exchange and use of intellectual and creative work contribute.

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[11] http://www.uis.unesco.org/culture/Documents/mtgreport1.pdf

This study argues that democratic copyright theories, in general, and in particular cultural democracy can further develop the alternative understandings of the current copyright regime. Indeed, cultural democracy provides an analytical and normative toolkit to pursue normative commitments in copyright law. Before I demonstrate how the foregoing discussions of democratic copyright theories apply to issues concerning the use of ebooks where the first sale doctrine plays out in the context of digital content, I introduce in the next section arguments for and against the access component embedded in the first sale doctrine.

WHAT IS THE FIRST SALE DOCTRINE?

The first sale doctrine, which extinguishes the copyright owner's right to control the subsequent disposition of that particular copy after its initial distribution, can be viewed as a "safety valve" that is recognized by the Copyright Act of 1976, along with the fair use doctrine and the idea/expression dichotomy (Goldstein, 1994). The fair use defense allows users of copyrighted works to access and use copyrighted materials without obtaining permission from the copyright holder when certain conditions are met, thereby this is considered a limitation and exception to the copyright holder's exclusive right granted by the government. The idea/expression dichotomy recognized by copyright law protects only original expressions thereby limiting the scope of subjects to which the copyright applies. The first sale doctrine is a way to balance the interests of copyright holders through control of dissemination while being remunerated for subsequent dissemination; it also supports the interests of consumers in receiving reasonable and

affordable access to copyrighted works.

Section 109(a) of the Copyright Act states that "the owner of a particular copy or phonorecord lawfully made under this title…is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[12] It should be noted that the doctrine applies only to the distribution right, which means that it does not apply to other exclusive rights accorded to the owner of copyright, such as public performance and reproduction rights.[13] Based on the first-sale doctrine, a lawful owner of a copyrighted work can resell or lend it to another without the copyright owner's consent. However, from the copyright owner's perspective, this doctrine limits opportunities for him or her to make a profit from the sale or loan of a particular copy (Goldstein, 1994). In a 2001 report, the U.S. Copyright Office followed this view in declining to extend the doctrine to digital transmissions (Davis, 2009).

WHY CARE ABOUT THE FIRST SALE DOCTRINE?

Copyright law is about balancing users' rights and copyright holders' rights. Why does balancing matter? The answer is simple. That is because copyright law governs our daily lives virtually on every front, determining the scope and boundaries of cultural works with which we interact. As many commentators have argued, if individuals' self-determination and freedom are core values that should be protected in a democratic

12 17 USC §109 (a) (2008).

13 Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F. 2d 275, 281 (4th Cir. 1989) (stating that "courts and commentators likewise agree that the first-sale doctrine has no application to the rights of the owner of a copyright guaranteed by 106, except the right of distribution.").

society, we should be concerned about the proper scope of copyright protection. As this dissertation demonstrates, for the past few decades, our society has witnessed repeatedly the dramatic expansion and extension of copyright protection. Now, the period protected by copyright has been extended to 70 years after a creator's death. Other "safety valves" in copyright law are becoming clogged and malfunctioning as well. Consider Stephanie Lentz's case started in 2007. She uploaded onto YouTube a short video clip showing her baby dancing to Prince's song *Let's Go Crazy*. Universal Music Group asked YouTube to take down Lentz's video, stating that it violated the record company's copyright. Today, most Internet service providers, such as YouTube, can easily delete allegedly copyright infringement materials because if service providers follow copyright holders' requests, they are exempt from copyright infringement under the Digital Millennium Copyright Act's notice-and-take-down system. Lentz did not want to follow YouTube's decision and filed a lawsuit, arguing that hers was a self-evident fair use case. Her argument, supported by public advocacy groups, was not accepted by the U.S. District Court for the Northern District of California (*Lenz v. Universal Music Corp*., 2008). Both parties appealed to a higher court and this case is still pending as of this writing. That is but one anecdotal case, but it raises a profound question: What is the purpose of copyright legislation?

Backed by the economic efficiency paradigm, copyright holders have exerted control over their works through judicial decisions along with legislative and/or technical solutions that favor the trend toward monetization that benefits only a handful of copyright owners, thereby depriving content consumers of opportunities to tinker with

cultural works. In that way, the current copyright system is failing in terms of balancing competing legitimate interests. This dissertation argues that the "safety valves" of copyright law are becoming increasingly clogged, and not properly functioning within the current copyright regime. Therefore, this dissertation advocates the expansion of the first sale doctrine to digital goods.

To address the question of the applicability of the first sale doctrine to copyrighted works in digital form, this section investigates three instances: the initiative to establish a Digital Public Library of America (DPLA), the *ReDigi* case, and the *Autodesk, Inc*. case. Each captures debates surrounding ebooks, digital music, and computer software, respectively. A short explanatory brief for those cases is provided here to set the framework for subsequent discussion in this dissertation.[14]

An important component of this discussion is that as more content has been made available in digital forms, licensing regimes increasingly assumed a gatekeeping role to control people's access to information resources. For libraries, the licensing problem with respect to ebooks has raised several issues in the past few years, including limited access contingent upon the libraries' ability to adhere to the license terms, which in turn limits the institutions' ability to donate and sell ebooks and places restrictions on archiving and

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14 These cases demonstrate how different types of digital content (i.e., ebooks, digital music, computer software) relate to the applicability of the first sale doctrine to digital copyrighted works. Each case represents one specific type of digital content. As of this writing, no legal case has been reported in the U.S. with regard to the resale of ebooks. Both *ReDigi* and *Vernor* cases have garnered a significant amount of attention from the media and academia, given that they have initiated the debate over the resale of digital music files and computer software, respectively. Even though the *ReDigi* case was about the resale of MP3 music files, ReDigi showed its interest in creating a digital secondary market for ebooks, thereby this case holds significance for the discussion of a digital first sale doctrine. It is also worth noting that the U.S. Supreme Court has not yet addressed the legality of resale of digital content.

preserving ebooks. The DPLA was originally intended to create an open platform for a wide range of online collections that included books, photographs, moving images, and other content from a network of partner libraries, archives, and museums across America. Although the DPLA deals with digitalized content from the public domain, some librarians envision that the DPLA can potentially make its voice heard by policymakers and legislators with regard to the issue of ebook lending.

ReDigi, a pre-owned digital marketplace where members buy and sell digital music, launched its service in 2011. The *ReDigi* case received attention when users of ReDigi services were required to download "Media Manager" to their own computers. Once installed, the Media Manager program built a list of "eligible" music files that the user possessed. The company then helped the user upload those files to ReDigi's "Cloud Locker," which is located on a remote server in Arizona. After the uploading process was completed, a digital music file became subject to an eligibility verification process. According to ReDigi's explanation, if a ReDigi user sells a digital music file, a request to access the file will be declined after which the file will be transferred to the new owner at the time of the transaction. Record companies objected to this process. Putting aside semantics, Capitol Records argued, a user's uploading a file "necessarily involves copying" the file from the user's hard drive to ReDigi's Cloud Locker (*Capitol Records, LLC v. ReDigi Inc.*, 2013, p. 2). Regardless of whether the original phonorecord ultimately is removed from the user's computer, the court in the *ReDigi* case held that the transmission of one material object from one place (i.e., the user's computer) to another (i.e., the ReDigi server) causes a reproduction of that material to occur. The court

continued that when another user of ReDigi downloads a music file from the ReDigi, another reproduction is created on the user's computer. In support of Capitol Records' argument, the *ReDigi* decision ruled that the transmission of a digital music file from one user's computer to another constituted copyright infringement by making unauthorized reproduction. The *ReDigi* case has far-reaching implications for the future of digital music distribution that go beyond this particular case. As Gautam (2014) notes:

> Most fundamentally, the *ReDigi* holding calls into question the aptitude of the current copyright law framework in the Internet age. Employing a 'narrow, technical, and purely legal' application of current copyright law, the *ReDigi* court reached a result in which the reproduction right effectively nullifies the first sale doctrine for works distributed via download. (Gautam, 2014, pp. 757-758)

The Ninth Circuit's *Vernor v. Autodesk* test tackled the applicability of the first sale doctrine to computer software. Timothy Vernor bought used software through a garage sale and attempted to resell a few packages of Autodesk's AutoCAD software on eBay. Autodesk, the copyright holder of the software, threatened Mr. Vernor with a lawsuit claiming that Vernor's activity constituted copyright infringement. The District Court in *Vernor* ruled that the first sale doctrine can be applied to the transfer in question. However, the Ninth Circuit Court ruled that Vernor was not covered by the first sale doctrine since the software in question was licensed, making it virtually impossible to resell the software that had been bought under the current restrictive licensing regime. The influence of the Ninth Circuit Court's decision goes far beyond the transfer of computer software in ways that require the legal, economic, and social impacts of the

case be fundamentally revisited and challenged. The above noted instances demonstrate that the application of the first sale doctrine to digital works relates to dilemmas in the digital environment. When it comes to the *ReDigi* case, this case poses a question rooted in the nature of digital works that involves the process of making another copy, whereas the *Vernor* case poses a question rooted in the licensing model.[15] Those dilemmas that are associated with people's use of digital works have led commentators to engage in a growing debate surrounding a digital first sale doctrine.

A discussion of the arguments for and against a digital first sale doctrine are reviewed in the next section. These arguments will carve out the grounds for examining the applicability of the first sale doctrine to different types of digital works in subsequent chapters of this dissertation.

ARGUMENTS AGAINST A DIGITAL FIRST SALE DOCTRINE

Many commentators have provided rationales both for and against a digital first sale doctrine. Here, I canvas arguments for and against a digital first sale doctrine. They address issues of the longevity of digital copies, and the material and immaterial qualities bound up in digital commodities.

First, opponents of a digital first sale doctrine may argue that it has an implied limitation on the number of transfers, given that physical copies degrade with time and wear (Asay, 2013). However, digital copies can last without losing quality for a long period of time. This feature of digital content leads some commentators to reject the

[15] It should be noted that licensing issue is not unique to digital works. This issue can also be applied to non-digital works.

adoption of a digital first sale doctrine, arguing that markets for the original copy will be negatively influenced if a digital first sale doctrine is adopted.

The materiality and immateriality of digital products pose dilemmas for the conventional property framework that normally considers a transfer of property rather easy. Leonardi (2012) notes that one can confidently say what materials were used to make the hammer, but "when one moves from the realm of the physical to the digital, it is much more difficult to isolate the materials out of which a technology [is] built" (Leonardi, 2012, p. 28). Given that most information technology artifacts such as Ebooks and computer software have no physicality, those artifacts may be accessible only with the help of technological objects that have physical properties. A growing body of scholarship on "materiality"[16] has paid attention to identifying "constituent features of a technology" that are used in many different ways to support social actors' various tasks (Leonardi, 2012). Indeed, the assumptions and presumptions of material properties resident in immaterial forms guide many of the discussions around copyright and digital content.

Such considerations figure in the second argument against digital first sale. Much of the scholarship that opposes a digital first sale doctrine has focused on the concept that

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[16] Materiality refers to "the arrangement of an artifact's physical and/or digital materials into particular forms that endure across differences in place and time and are important to users" (Leonardi, 2012). Without defining what "materiality" means in the context of copyright, Burk (2010) argues that: "Materiality is…key to copyright law…Changes in copyright represent a strategic response to the increasing de-materialization of the text that, ironically, rely upon the text's materiality. Copyright protects the intangible, idealized work instantiated in a material substrate. The legal exclusivity of copyright subsists only in works fixed in a tangible medium of expression for some substantial duration. This is because copyright was intended to reinforce the natural resistance of material instantiation to appropriation; copyright assumes that the technological pressure point where control may be asserted is at the point of reproduction and so confers upon the author a copyright—that is, not only the right *to* copy, but also the right *to prevent copying* and related activity" (pp. 225-226).

transmitting a digital file necessarily involves a process of reproduction (Plovnick, 2012). Diaz (2008) points out that "selling" a digital music file can be considered as selling a copy of the file since "uploading it doesn't really take it off your hard drive" (para. 2). In a similar vein, Calaba (2002) notes that transmitting a work in digital form makes the transferor generate a duplicate copy of the original work, which is then transferred to a recipient. For instance, when one sells the MP3 file, a copy of the MP3 file is transferred instead of the particular copy remaining on the seller's hard drive. If the duplicate copy falls within the scope of a "copy" under the Copyright Act, then the process can constitute copyright infringement. As noted above, the ReDigi case relied on this point in rejecting the applicability of the first sale doctrine to the digital sphere.

Kupferschmid (1998) argues that digital transmission without permission of the copyright owner is an infringement of the copyright owner's distribution, reproduction, and display rights regardless of whether the original copy is destroyed after its transmission, a third argument. He opposes an amendment to extend the first sale doctrine to digital media for three reasons. First, like other opponents of a digital first sale doctrine, he points out that it is impossible to transmit a copy of a copyrighted work online without making a copy of the original copy, which infringes the copyright owner's reproduction right. Second, "even if one assumes that transmitting a copy of the work does not infringe the copyright owner's reproduction right, the first-sale exception would not apply because the copy being distributed is not the 'particular copy' but rather a new copy" (p. 838). The first two reasons are related to the issue of temporary reproduction discussed above. Third, according to Kupferschmid (1998), applying the first-sale

doctrine to digital transmissions online is incompatible with the original intent of the doctrine because "it would unduly impinge upon copyright owners' distribution rights by discouraging them from using the Internet as a vehicle for delivering their works to consumers" (p. 838). Kupferschmid's (1998) third point, employed in opposition to a digital first sale doctrine, is rooted in the economic efficiency paradigm that is the dominant justification for copyright protection.

In regard to the third point, some commentators argue that the media industries will face a severe financial threat if the first sale doctrine is applied to the digital sphere. Proponents of the economic efficiency paradigm argue in that situation, creators are unlikely to be incentivized and thereby unlikely to create cultural works in ways that eventually would be harmful to the general public.

Acknowledging the benefits of policy outcomes of the first sale doctrine, Gautam (2014) provides a cautious and pessimistic prediction about the first sale doctrine after the U.S. Supreme Court's *Kirtsaeng* decision that virtually nullified copyright holders' ability to implement geographic price discrimination. He contends that the *Kirtsaeng* decision may further incentivize content industries, particularly in the case of publishers, to resort to a digital distribution model because digital formats allow them to control subsequent disposition of and use of their content through licensing agreements. Gautam (2014) further argues that given that copyright holders have usually utilized DRM with licensing agreements to maximize their profits, further acceleration to switch to digital distribution may affect consumers' benefits in negative ways.

ARGUMENTS FOR A DIGITAL FIRST SALE DOCTRINE

As noted above, opponents of a digital first sale doctrine stress the fact that digital copies of copyrighted works create a perfect copy of the work and these copies can negatively influence the market for the original work. However, Rothenberg (1999) claims that contrary to the common perception of digital content, the longevity of digital content is not free from a number of interrelated problems (Rothenberg, 1999). For example, digital files are also "vulnerable to loss via decay and obsolescence of the media on which they are stored, and they become inaccessible and unreadable when the software needed to interpret them, or the hardware on which that software runs, becomes obsolete and is lost" (Rothenberg, 1999, p. v). This is particularly true in a rapidly changing technology environment. We can still enjoy Ernest Hemingway's *The Old Man and the Sea* published in print in 1952 without problems, but reading a manuscript stored in a floppy disk manufactured in 1982 is now virtually impossible for most people.

Under the current copyright system, a lawful purchaser of copyrighted material in digital format is not allowed to freely transfer her copy. Those who favor extending the doctrine to copyrighted works in digital format basically value "the right of an owner of a legal copy to dispose of it" (Smith, 2005, p. 855). For example, Calaba (2002) introduces several proposals for implementing a digital first sale doctrine, including the simultaneous destruction proposal written by Representatives Boucher and Campbell, which requires the transferor of a copyrighted work to immediately erase the particular copy after the transfer is complete. Another way of facilitating a digital first sale doctrine is adoption of a registration system that records the serial number for the work and for the

computer's processor used to operate the file. Calaba (2002) argues that the first sale doctrine needs to be applied to digital works "through a combination of legislative amendment and development of technological measures protecting copyright owners' rights" (p. 35).

Calaba (2002) raises concerns about the information inequities created by schemes that fall short of first sale. He asserts that the first sale doctrine should be applied to a work rightfully owned by anyone regardless of the work's embodiment as a digital object, when considering the spirit of the doctrine, arguing that the applicability of the doctrine to digital works is closely related to libraries' mission. Noting the dangerous future of an environment without first sale, he writes: "Where libraries lack the ability to pay license fees so that its patrons can access the work, some patrons may have the means to pay for individual access while others may not, potentially creating an informational divide" (Calaba, 2002, p. 24). In most contemporary situations, digital works are licensed, not sold to consumers, and additional restrictive terms and conditions are usually attached to those licenses. Restrictive license agreements deployed by software companies and the DMCA's anti-circumvention provisions prohibit users from transferring and reselling many forms of digital works, which can lead to detrimental effects. As Fred Von Lohmann, then-senior staff attorney for the Electronic Frontier Foundation, stated, "We shouldn't lose our first-sale rights just because the second-hand stores involved are online" (as cited in Sandoval, 2008). In other words, the applicability of the first sale doctrine should not be determined by the means of distribution.

Smith (2005) claims that applying the first sale doctrine to digital media can be

justified by recent developments in digital rights management (DRM) technology, copyright enforcement, and technological concessions. First, DRM enables copyright holders to control the sale, distribution, and use of their intellectual property, and, second, DMCA copyright holders have enforcement methods available to sue infringers and deter illegal downloads. Third, he points out that a fair use exception has already been applied to temporary copies stored in RAM during audio streaming. According to Smith (2005), these changes make the argument against the digital first sale doctrine less persuasive, and he goes so far as to state that by accepting a digital first sale doctrine the music industry may end up getting *more* control of digital copies. Since digital files are finite in longevity and format, consumers will increasingly need new versions of digital files. Thus, people may turn to a licensing option rather than owning a digital copy if the cost for licensing is cheaper than that of ownership (Davis, 2009; Smith, 2005).

Hess (2013) proposes an architectural solution that makes digital files degrade over time, recognizing the limits of "forward-and-delete" technology. For instance, IBM's aging file system "employs a code to receive original digital copies, determine their file type, create an aged file according to the file type and preset aging parameters, and replace the stored file and associated file metadata" (Hess, 2013, p. 2006). This can be seen as a way to mitigate the difference between digital property and physical property. The Copyright Office viewed the tangible aspect of the copy as a core element of the first sale doctrine. Hess argues that introducing degradation into the digital file can be a good way to achieve the original goal of the first sale doctrine, while at the same time harmonizing with the Copyright Office's interpretation of the doctrine.

Asay (2013) writes that to preserve the original intent of the doctrine, there is a need to abandon both the licensee/owner dichotomy and the formalistic approach to extending the doctrine to digital copyrighted works. He criticizes federal court decisions that did not apply the doctrine to the licensee by focusing on the distinction between the licensee and the owner of the copy (Asay, 2013). Given that the purpose of the doctrine is to limit copyright outright, circumventing the doctrine through "semantics" should not be allowed. According to Asay (2013), a digital first sale doctrine might help reduce piracy as consumers turn to secondary markets instead of pirating digital works. In turn, secondary markets might also help boost sales of other copyrighted works through increased exposure.

Another perspective on the applicability of the first sale doctrine to digital works proposes a middle ground solution to please both sides (i.e., the copyright owner and users of copyrighted works). Serra (2013) suggests that one might consider a resale royalty scheme that "recognizes the unique risks that nondegrading digital formats, connected to a vast and limitless distribution system, pose for copyright owners," and at the same time "stays true to the axiom that a consumer has the right to alienate his personal property, though it be digital" (p. 1799). Serra points out that historically the first sale doctrine sought to balance the interests of both sides.

The forgoing arguments for and against the adoption of the first sale doctrine to digital transmissions and proposed solutions have focused largely on presumed economic consequences regarding a digital first sale doctrine or legal issues, such as the question of what constitutes unauthorized reproduction during the processes of digital transmissions.

To be fair, it should be noted that several previous studies have proposed policy recommendations or technical approaches in order to make arguments for adopting a digital first sale doctrine more persuasive. However, those studies did not pay adequate attention to a normative framework that can guide us to reevaluate the current copyright regime within a broader context. This dissertation seeks to fill the academic lacuna.

OWNERSHIP AND USE OF COPYRIGHTED WORKS IN THE DIGITAL AGE

The question of whether the first sale doctrine should be applied to digital media becomes increasingly important as more and more transactions are being conducted in digital format as a result of people's greater use of the Internet and digital technologies. The ease of making copies in digital format without quality degradation presents many issues, including discussion of extending the first sale doctrine to digital media (Smith, 2005). The issue of temporary reproductions in the digital age is not directly related to the first sale doctrine, but without solving that legal controversy we cannot think of a viable digital first sale doctrine. Thus, the section below addresses the temporary copy issue within the context of copy ownership in the digital age.

Some commentators argue that digital copyrighted works require a substantial reconfiguration of copyright law since the U.S. copyright law originated from a print-based model (Boyle, 1996; Litman, 1996; Liu, 2001). As noted above, one unique challenge presented by digital technology is that nearly all uses of digital content are involved in the creation of copies of the copyrighted work. Influenced by a decision in

the case of *MAI Systems Corp. v. Peak Computer Inc.*,[17] several federal courts[18] have ruled that the process of loading a digital file into a computer's RAM (random access memory) results in the creation of a copy of the digital work, which might violate the copyright owner's reproduction right. Although some ambiguities associated with the statutory fixation requirement were clarified by a decision in the case of *Cartoon Network, LP v. CSC Holdings, Inc.*,[19] there are no applicable guidelines regarding the determination of how stable a copy should be in order to constitute copyright infringement. It is hard to imagine a situation where modern digital products can work properly without passing through a computer's RAM. In her book "*Digital Copyright*," Litman (2006) argues that "If temporary copies are [an] unavoidable incident of reading, we should extend a privilege to make temporary copies to all" (p. 183). One can reasonably argue that "Once I buy my copy I should be entitled to dispose of it as I wish. This is, after all, what it ordinarily means to own a piece of physical property" (Liu, 2001, p. 1248). Liu (2001) aptly questions why what one can do with a book should be so "dramatically" contingent upon whether the person has downloaded the book onto his or her hard drive or purchased a copy in a bookstore (p. 1251).

Recognizing differences between analog and digital environments, Litman (1996) argues that "we might most profitably abandon copyright law's traditional

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[17] MAI Systems Corp. v. Peak Computer Inc., 991 F. 2d 511 (9th Cir. 1993).

[18] See DSC Communications Corp. v. DGI Techs., Inc., 81 F.3d 597, 600 (5th Cir. 1996); NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 235 (7th Cir. 1995); Stenograph L.L.C. v. Brossard Associates, Inc., 144 F.3d 96 (D. C. Cir. 1998).

[19] Cartoon Network, LP v. CSC Holdings, Inc., 536 F. 3d 121 (2d Cir. 2008). (With regard to the buffer data, the court held that two requirements should be met in order to say that the buffer data is a copy of the original work. According to the court, "The work must be embodied in a medium…and it must remain thus embodied 'for a period more than transitory duration.'" at 127).

reliance on reproduction, and refashion our measure of unlawful use to better incorporate the public's understanding of the copyright bargain" (p. 48). On the contrary, in support of giving copyright holders the right to control access in the digital environment, Ginsburg (2006) claims that "the access right is an integral *part* of copyright, and therefore should be subject to exceptions and limitations analogous to those that constrain 'copy'-right" (p. 42, emphasis in original).

The two starkly different perspectives of digital copyright show how difficult reaching middle ground on the applicability of the first sale doctrine to digital works has been. This can be summed up as a debate between the copyright optimist and the copyright pessimist. As Goldstein (1994) aptly puts it, "every major clash over copyright…is at bottom a clash between the view that copyright's cup is half full and the view that it is half empty" (p. 13). Ultimately, the debate over "temporary copies" in a computer's RAM closely relates to one's normative framework for thinking about the relationship between the copyright owners and the owners (or users) of copyrighted works (Litman, 2006; Liu, 2001). This dissertation argues that the debate also relates to questionable automatic translation of material assumptions to immaterial forms. As Burk (2010) aptly notes, "Digitization eliminates many physical characteristics of creative works, embodying creativity as ethereal bits rather than material atoms" (p. 226). However, sufficient attention has not been paid to the link between copyright and material assumptions of ownership that have been attached to physical artifacts, a topic that needs to be rearticulated in the digital environment. To be fair, it should be noted that legal scholarship, policy makers, and the courts have addressed the issue of "temporary

copies" in order "to reconcile the traditional understanding of the copy with the technological developments that threaten to undermine it" (Perzanowski, 2010, p. 1068). However, those efforts have focused on the interpretation of statutory phrases, paying little attention to normative accounts of copyright's original intent and democratic principles.

In conclusion, previous studies have investigated the historical background and development of the first sale doctrine as well as its implications in the digital age. However, those previous studies did not fully consider normative accounts of copyright that allow us to evaluate whether the current copyright regime provides proper boundaries for intellectual property protection. Also, they have paid scant attention to the increasingly problematic dichotomy between the immaterial "work" and a physical "copy" fixed in a tangible medium. Whether this distinction is sustainable has never been coherently reviewed, in particular, within the context of the application of first sale doctrine. To fill gaps in the literature, this study examines the applicability of the first sale doctrine to digital media products, with a particular focus on the question of what "owning" a copy of a copyrighted work should mean in the digital environment. This task will be undertaken with a lens drawn from the democratic theory of copyright.

Chapter 3: Policy Outcomes, Judicial and Legislative History

INTRODUCTION

This chapter presents an overview of the origins and development of the first sale doctrine, the historical and contemporary court decisions with regard to the doctrine as well as the effects of and justifications for the doctrine. In so doing, this chapter provides a condensed history of the doctrine. Cultural democracy values and seeks broader social goals such as people's enhanced access to cultural works and more egalitarian participation in cultural meaning-making processes, and within that context the first sale doctrine is seen as one mechanism by which those broader social goals can be achieved. That said, cultural democracy and the first sale doctrine have a mutually reinforcing relationship and both are policy objective. In other words, each supports the other. The first sale doctrine, on one hand, enables a lawful owner of a copy of a copyrighted work to sell, lease, lend, or transfer that particular copy but, on the other hand, limits the copyright owner's right to control that copy once sold.

The policy outcomes of the first sale doctrine have been well documented in the literature (see Perzanowski & Schultz, 2011). Since the doctrine limits a copyright holder's right to her work once ownership of the copyrighted work is transferred, subsequent owners of that particular copy can sell or lend it without worrying about committing copyright infringement. Without the doctrine, secondary markets of physical

copyrighted works could not exist, such as used book stores. The doctrine enables those who cannot afford to buy new copies of copyrighted works to access those works at a lower price through secondary markets. Libraries are able to fulfill their mission thanks to the first sale doctrine, which enables them to lend books to patrons. Secondhand markets and public libraries could not exist without the first sale doctrine. Below I discuss further the policy rationales for the first sale doctrine.

JUDICIAL DECISIONS AND LEGISLATIVE RESPONSES

With development of digital technology, the artificial distinction under the copyright law between copyright ownership and ownership of a material object embodying the copyright owner's creative expression has been increasingly challenged because some people think that separating content from its physical form is easy to accomplish in the digital age.[20] Here, it is important to recognize the fact that what copyright law protects is creative expression itself and that the creative expression cannot be transferred without the help of an object, regardless of its format. That is, creative expression itself and an object embodying that particular expression are intrinsically connected. The connection does not change whether the creative expression is embodied in a paper format or in an electronic file. The *ReDigi* case holds significance in that it poses questions about whether digital purchased works can be resold under the first sale doctrine. By tracing the development of the first sale doctrine, this chapter reveals how this particular provision came into being. Congress, for its part, stated: "First sale is

20 From the perspective of copyright holders, the ease of file transfer led to greater worries about the negative effects of the first sale doctrine on their revenue.

rooted in the common law rule against restraints on the alienation of tangible property" (*The Register's Call for Updates to U.S. Copyright Law*, 2013, p. 25).

The first sale doctrine itself has been developed and shaped by court decisions, rather than statutes, in the U.S. The cases that have had significant importance in the operation of the first sale doctrine are discussed chronologically below. Special focus is given to three cases: *Bobbs-Merrill Co. v. Straus, Kirtsaeng v. John Wiley & Sons, Inc., and Capitol Records, LLC v. ReDigi Inc*. The first two cases addressed the first sale doctrine in the context of physical books. Those cases set the foundation for the operation of the doctrine or clarified a gray area by ruling that the doctrine is applied to foreign-made and later imported copies.

U.S. courts recognized the doctrine at least as early as 1894 in the case of *Harrison v. Maynard, Merrill & Co*.[21] In 1893, a "destructive fire" occurred at a book publisher's warehouse, damaging unbound pages of a book entitled *Introductory Language Work* (*Harrison v. Maynard, Merrill & Co*., 1894). The copyright holder instructed its bookbinder to sell all the debris as wastepaper with the following condition attached: "It is understood that all paper taken out of the building is to be utilized as paper stock, and all books to be sold as paper stock only, and not placed on the market as anything else" (p. 689, internal quotation marks omitted). A seller of used books, who bought those leaves, bound the papers together and sold them as reassembled books. The copyright holder brought suit against the used bookseller to stop him from selling the

[21] Harrison v. Maynard, Merrill & Co., 61 F. 689 (2d Cir. 1894).

reassembled books. In this, one of earliest of cases related to the first sale doctrine, the appellate court ruled that:

> The right to restrain the sale of a particular copy of the book by virtue of the copyright statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes. (p. 691)

Some commentators argue that this early case can be regarded as "set[ting] the stage for a more expansive application of the exhaustion principle" (Perzanowski & Schultz, 2011, p. 913; Siy, 2013).[22] The exhaustion principle (also referred to as the first sale doctrine) extinguishes the copyright holder's distribution right of a copy after its initial sale. More than a decade later, the exhaustion principle was affirmed by the U.S. Supreme Court in 1908 in the case of *Bobbs-Merrill Co. v. Straus*[23] discussed below. This doctrine, based on common law, had been established by court decisions until it was first codified in the Copyright Act of 1909. Section 41 of 1909 Copyright Act reads:

> That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the

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22 The exhaustion principle in the copyright context refers to the first sale doctrine, and the two terms are often used interchangeably. Meanwhile, "under U.S. Patent Law and U.S. Trademark Law schemes, the term 'Exhaustion' is used to refer to this same concept" (Sardina, 2011, p. 1055).

23 Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).

> copyright constitute a transfer of the title to the material object but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained. (Section 41 of 1909 Copyright Act)

The first time the doctrine was referred to as the "first sale doctrine" by a federal court was in Judge Freedman's 1964 opinion in the case of *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*[24]

Bobbs-Merrill Co. v. Straus (1908) and Copyright Acts

According to Graham (2002), the doctrine's conceptual origin can be traced to 1854. In the case of *Stevens v. Royal Gladding*,[25] "the sole question [was], whether the mere fact that the plaintiff owned the plate, attached to it the right to print and publish the map, so that this right passed with the plate by sale on execution" (p. 452). In that case, the Court ruled that the copyright is severable—that is, the copyright and the plate were "distinct subjects of property" (p. 452). More than five decades later, in 1908, the first sale doctrine was upheld in the case of *Bobbs-Merrill Co. v. Straus.*[26]

In the case of *Bobbs-Merrill Co. v. Straus*, the plaintiffs filed a lawsuit arguing that the defendant booksellers impinged on their right by selling copies of a novel entitled *The Castaway* for eighty-nine cents. A price-restriction notice was attached to each copy of the book, which read: "The price of this book at retail is $1 net. No dealer is licensed

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24 Burke & Van Heusen, Inc. v. Arrow Drug, Inc., 233 F. Supp. 881 (E.D. Pa. 1964).

25 Stevens v. Royal Gladding and Issac T. Proud, 58 U.S. 447 (1854).

26 Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).

to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright" (*Bobbs-Merrill Co. v. Straus*, 1908, p. 341). The Court ruled that the Copyright Act did not "create the right to impose, by notice…a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract" (p. 350). The ruling was handed down on the grounds that the copyright owner's right does not extend to all subsequent sales of his or her work.

Following enactment of the Copyright Act of 1790, there were no major revisions to the U.S. Copyright Law until 1909. It took a number of years for both houses of Congress to pass the Copyright Act of 1909, partly because it was not easy to come to a compromise regarding the protection for music composers when particular mechanical devices were involved to reproduce copyrighted works ("Copyright bill passed", 1909). The Copyright Act of 1909 extended its coverage to all reproductions of musical compositions regardless of whether a mechanical device was involved, adopting a compulsory license system so that musicians use others' songs without obtaining permission if they paid a predetermined royalty. Reflecting the Court's decision in the case of *Bobbs-Merill Co. v. Strauss*, the Copyright Act of 1909 incorporated judicially crafted doctrines and the first sale doctrine as represented in Section 41 (above) was one of them. The Copyright Act of 1909 was a "consolidation of and amendment to many existing statutes, with certain new provisions" ("Copyright law's enlarged scope", 1909, p. BR132). At that time, the House Report stated that "Section 41 is not intended to

change in any way existing law, but simply to recognize the distinction, long established, between the material object and the right to produce copies thereof."[27]

After the Copyright Act of 1909, no major changes were made to the statute during the first half of the 20th century, leaving it outdated and lagging behind technological developments (Copyright Law Revision, 1960). In 1947, Congress amended the Copyright Act of 1909 as Title 17 of the United States Code. Section 41 was renumbered as Section 27 and wording of that section was changed, accordingly. Section 27 of the Copyright Act of 1947 reads:

> The Copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained. (Section 27 of the Copyright Act of 1947).

A more thoroughgoing shift in copyright was central to the Copyright Act of 1976 particularly in the wake of the *American International Pictures* case. In 1976, when deliberating a first sale-related section in revising the Copyright Act of 1947, the Committee on the Judiciary paid attention to this case (*American International Pictures, Inc., v. Foreman,* 1975),[28] holding that "the plaintiff in an infringement action had the

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27 H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

28 American International Pictures, Inc. v. Foreman, 400 F. Supp. 928 (S.D. Ala. 1975).

burden of establishing that the allegedly infringing copies in the defendant's possession were not lawfully made or acquired under section 27 of the present law" (H. R. Rep. No. 94-1476, 1976, p. 80). According to House Representative Report No. 94-1476 (1976), in determining whether a defendant could exercise privileges established by section 109(a) and (b), the defendant needed to prove that a particular copy of a copyrighted work was lawfully made or obtained. The Committee reasoned that "[t]he defendant…clearly has the particular knowledge of how possession of the particular copy was acquired, and should have the burden of proving this evidence to the court" (H. R. Rep. No. 94-1476, 1976, p. 81).

The Copyright Act of 1976 was the first major revision since 1909. Congress officially codified Section 109 in the Copyright Act of 1976. Section 109(a) states that "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without authority by the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." Litman (1987) captures some of the ambiguity and comments that some provisions of the Copyright Act of 1976 "purport to adopt common law doctrine; others purport to abrogate it" (p. 859).

Creating Statutory Exemptions to the First Sale Doctrine

Advances in modern technology enabled people to duplicate copyrighted works with ease, which led to legislative efforts after the 1976 Copyright Act to generate statutory exemptions to the first sale doctrine (Corsello, 1991). As shown below,

Congress considered those exemptions medium by medium. In the early 1980s, consumers could get a rented phonograph record through music rental stores at prices ranging from $0.99 to $2.50, and many consumers engaged in copying the rented music record (Audio and Video First Sale Doctrine, 1983/1984). In the United States, some music rental stores gave their customers free blank tapes for taping at home, and in some cases record rental shops' advertisements encouraged their customers to engage in home taping (Audio and Video First Sale Doctrine, 1983/1984). For example, one record rental shop inserted the following phrase in its advertisement: "NEVER, EVER BUY ANOTHER RECORD!!" (Audio and Video First Sale Doctrine, 1983/1984, p. 30). Another record rental shop used more subtle language: "Now, we won't tell you How best to enjoy these albums, but, we figure, if you're smart enough to come to Dudeff's in the first place, you're smart enough to figure that one out for yourself" (Audio and Video First Sale Doctrine, 1983/1984, p. 29). The same record rental shop also used the following phrase: "OH YEAH! I HAVE GREAT DEALS ON BLANK TAPES AND ALBUMS TOO!!" (p. 29).

With regard to audio record renters' home taping behavior, evidence from Japan was presented during Congressional hearings on the Audio and Video First Sale Doctrine. In early 1980s, the record rental business was still in its early stage of development worldwide and the first record rental outlet launched its business in Japan in 1980 and as of 1983, more than 1600 record rental shops existed in Japan (Audio and Video First Sale Doctrine, 1983/1984). According to one survey conducted in Japan, over 97 percent of consumers who used record rental shops engaged in taping the rented

records, and those who were in support of creating first sale exceptions to the record rental case envisioned that a similar situation would occur in the United States (Audio and Video First Sale Doctrine, 1983/1984). The record industry considered the prevailing phenomenon of home taping as a serious threat to its industry and proponents of creating first sale exceptions to commercial record rental pointed out that the industry had already experienced a steady decline in revenues between 1978 and 1982 (Audio and Video First Sale Doctrine, 1983/1984).

In her testimony at the 1989 Senate Computer Software Rental hearing, Heidi Roizen, then President of the Software Publishers Association, stated that "the software industry has had to rely on moral suasion to prevent people from stealing our products through software rentals" (Computer Software Rental Amendments Act of 1989, 1989, p. 39). The computer and recording industries successfully lobbied Congress to include exceptions to the first sale doctrine (Davis, 2009). They wanted to secure revenues from the then-burgeoning rental business. Again, the concern over consumers' engagement with copying at home was presented:

> Heidi Roizen also stated in her testimony:
>
> We believe these "rentals" are just opportunities to copy software…Moreover, most applications are really only useful if you store data on them. Again, it is difficult to believe that someone would rent a computer program, insert all their data, and then erase that same material before returning the diskette. What is really happening is that these programs are being copied by the people who "rent" them. (Computer Software Rental Amendments Act of 1989, 1989, p. 39)

At Congressional hearings on the topic of creating exceptions to first sale, both the record industry and the computer software industry expressed their concerns over consumers' engagement with home taping and copying software, and potential detrimental influence on both their business and the American economic community was addressed. It was taken for granted that new revenue streams drawn in the future from new technological developments should benefit the content industries. It can be fairly said that the dominant understanding of copyright protection which served the arguments of those industries present at Congressional hearings was the economic incentive paradigm.

Eventually, efforts of the content industries to create exemptions to the first sale doctrine worked. In 1984, Congress passed the Record Rental Amendment, which does not allow the lawful purchaser of a copy of a sound recording to rent, lease, or lend that copy without the copyright owner's permission.[29] A few years later, Congress enacted the Computer Software Rental Amendments Act of 1990. The software industry had successfully lobbied Congress to enact statutory first sale exceptions[30] and had adopted restrictive licensing practices that preclude consumers from reselling or renting their purchased software (McIntyre, 2014). The legislation prohibited the rental, lease, or lending of computer software for commercial purposes without authorization from the

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29 Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified as amended at 17 U.S.C. § 109(b) (2000)).

30 U.S.C. § 109(b) (B) (2012). ("This subsection does not apply to (i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or (ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.").

owner of the copyright in the program, with some exceptions for the rental of console-based video games and embedded computer programs.

During the early 1980s, the motion picture industry also lobbied Congress and a bill similar to that governing software was introduced (e.g., H.R. 1029) to include exemptions to the first sale doctrine with regard to the rental of videocassettes and discs.[31] However, due to a backlash from both consumers and video rental stores, the motion picture industry's effort to extend statutory exemptions to movie rentals failed.

It is worth noting that when discussions about creating statutory exceptions to the first sale doctrine to control rental of video tapes were underway in the U.S. Congress, the U.S. Supreme Court's landmark case in the *Universal Studios v. Sony* was being considered. During Congressional hearings, Robert W. Kastenmeier, a Democratic Representative from Wisconsin who represented the interests of consumers, asked the following question to Steven Roberts, President of 20TH Century Fox Telecommunications, who represented the film entertainment industry: "Do you think the enactment of this legislation would render the outcome of Universal Studios v. Sony less important either legislatively or in terms of litigation? (Audio and Video First Sale Doctrine, 1983/1984, p. 206).

Mr. Roberts replied:

> The Betamax case is being heard by the Supreme Court, and it stands on its own in that environment. This, we believe, is a very separate issue. Both issues deal in the copyright area but this one addresses a very different problem. And we would

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31 Consumer Video Sales-Rental Amendment, H.R. 1029, 98th Cong. (1983).

like this to stand on its own merits. (Audio and Video First Sale Doctrine, 1983/1984, p. 206)

Congressman Kastenmeier disagreed with Mr. Robert's statement that the proposed legislation governing video rentals and the Supreme Court case governing individuals' home video taping were different. The Congressman noted:

> It is different, but there are also similarities and connections. They both have a connection with *home tape recording*. They both deal with lack of control over product; that is, *ultimate lack of control*. They both attempt through some new legislative means or judicial means, to acquire the royalty which is not now due studios, except equitably, one could say. In that sense there are some similarities. (Audio and Video First Sale Doctrine, 1983/1984, p. 206, emphasis added)

The film entertainment industry was concerned that individuals would tape videos at home and negatively impact that industry's revenue stream. Speaking on behalf of the film industry, Mr. Roberts's remark demonstrated why that industry wanted to distinguish the two types of home taping as being separate: in order to maximize revenue from all streams, including control of the video rental business and restriction on individuals' home video taping. Arguably, the failure of lobbying efforts by the motion picture industry was influenced by the Supreme Court's understanding of individuals' private home taping behavior and the general public's awareness of the issue. This discussion of consumer interests versus content industry's desire to maximize revenue demonstrates why understanding the politics surrounding a particular piece of legislation or societal issue is important. Chapter 4 undertakes a positive evaluation of the ebook

ecosystem and its politics. Based on a positive evaluation, later chapters make a normative argument.

In retrospect, it is important to note that when the motion picture industry lobbied Congress to prohibit the commercial rental of videocassettes and discs without the copyright holder's permission, the industry was becoming aware that lucrative new revenue streams could be derived from videocassette and disc rental stores (Audio and Video First Sale Doctrine, 1983/1984). The motion picture industry that was already benefiting from various other revenue streams, such as box office, cable, airline and television sales, realized in the early 1980s that videocassette recorders could create another huge market. Arguably, these situations led the motion picture industry to take a somewhat different position, compared to that of the record industry, in terms of promoting the creation of statutory exemptions to the first sale doctrine.

"Congress felt that renters would have no desire to own their own copy of the rented movies" (Corsello, 1991, p. 193) in contrast to making copies of music or computer software. Conventional wisdom holds that people do not usually watch a movie over and over again, with the exception of kids' videos. Thus, Congress focused on the level of difficulty in copying a rented video as opposed to copying a music record and computer software along with the unlikelihood that consumers would make permanent copies of videos for repetitive viewing. Dr. Nina Cornell, an economist, testified at the Audio and Video First Sale Doctrine hearing noting: "Most people rent most videocassette titles because it is not worth much to them to see the same movie many

times, and, therefore, they will not pay a large premium to buy rather than rent" (Audio and Video First Sale Doctrine, 1983/1984, p. 238).

When the film industry lobbied Congress to include exemptions to the first sale doctrine, video retailers collectively expressed their concern over giving the motion picture industry a virtual monopoly over film distribution (Harris, 1982). When expressing their concerns, the coalition of video retailers along with consumer groups effectively employed a rhetorical argument, as well as refuting the motion picture industry's arguments with market data. For example, Jack Wayman, Senior Vice President of the Consumer Electronics Group of the Electronic Industries Association and Chairman of the Home Recording Rights Coalition, argued:

> Once the small retailer…is subject to Hollywood's demands, the movie industry will be free to gouge the consumer. Hollywood is eagerly awaiting its chance. As an MPAA spokesman has candidly put it, H.R. 1029 is a quest for "maximization of revenues," a product of "greed." Who pays for such greed? The video retailer and the consumer (Audio and Video First Sale Doctrine, 1983/1984, p. 224).

Corsello (1991), who had observed that consumers do not want to make copies of video, noted, "The failure of the motion picture industry to secure passage of the Consumer Sales-Video Rental Amendment was not a total loss to film producers, however, because revenues from video cassette rentals are today a major source of their income" (p. 192). During the 1980s and early 1990s, the movie rental business experienced rapid growth in the United States, and the movie industry's revenue from the video business for years exceeded their box office revenue (Corsello, 1991; vanden

Heuvel, 2012). Not surprisingly, the movie industry initially figured that only a little revenue would be secured from video rentals and "first asked for legislation to restrict rentals" (Audio and Video First Sale Doctrine, 1983/1984, p. 224). However, after realizing the potential scope of the video rental business, the motion picture industry wanted to control the video rental business. Throughout history, whenever new technologies have paved the way for new business models in the market, copyright holders such as the motion picture industry have been reluctant to embrace the new technologies and have asked Congress to enact legislation that would give them the power to control the business model and subsequent revenues. In that way, copyright holders have resorted largely to the economic incentive framework. Simply put, their arguments have been the same: If we keep losing revenue from the market, we may not be able to generate new content. Before we reach that point, Congress should provide a legislative solution.

Legislative Efforts to Adopt a Digital First Sale Doctrine

With the advent of digital technologies and the Internet, the copying question became whether the first sale doctrine could be applied to *digital* transmission. In 1995, a presidential task force pondered the question and eventually concluded that the first sale doctrine does not operate in the case of digital transmissions.[32] The task force argued that "the first sale model…should not apply with respect to distribution by transmission,

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32 Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (1995). Available at: http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf

because transmission by means of current technology involves both the reproduction of the work and the distribution of that reproduction" (p. 95). In 1997, Representatives Dick Boucher (D-VA) and Tom Campbell (R-CA) introduced a new House Bill entitled "Digital Era Copyright Enhancement Act" (H.R. 3048) in an effort to update the Copyright Act for the digital age.[33] The proposed bill considered that the digital first sale doctrine makes legal the transmission of a lawfully acquired copy of a copyrighted work under the copyright law as long as that person who acquired the work deletes the original copy from her computer when transferring it. According to the proposed bill, if in the end only one original copy exists, the transmitter is not subject to copyright infringement. In addition, the proposed bill sought to address the issue of restrictive licensing terms that abrogate consumers' rights as well as broader reproduction and distribution of un-copyrightable materials. Although the bill was not enacted by Congress, the proposed legislative initiative indicates an effort to rebalance the interests of consumers and copyright holders (Long, 2008; Newman, 2010).

In 2003, three bills were introduced to extend the first sale doctrine to digital works. Those bills were the Digital Consumer Right to Know Act (2003), the Benefits Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act (2003), and the Consumer, Schools, and Libraries Digital Rights Management Awareness Act (2003).[34] The Digital Consumer Right to Know Act had a provision that would

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33 See http://thomas.loc.gov/cgi-bin/query/z?c105: H.R. 3048:

34 The BALANCE Act included a provision that legalize the resale of digital goods. Under the proposed bill, Section 109 of Copyright Act is amended by adding the following: "(f) The privileges prescribed by subsections (a) and (c) apply in a case in which the owner of a particular copy or phonorecord of a work in

require a producer or distributor of a copyrighted work to inform consumers of any technological protection measures that prevent the consumer from "engaging in the secondhand transfer or sale of legally acquired content to another consumer."[35] The other two bills specifically applied the first sale doctrine to digital goods under the condition that the seller does not retain his or her digital work after the sale, virtually abrogating licenses that limit consumers' right to the resale of their digital works (Serra, 2013). As Serra (2013) contends, the failed proposals did not pay enough attention to balancing the copyright holders' interests against the interests of the public. Although the intent to benefit the public by expanding the first sale doctrine to digital goods and thereby allowing their resale took a step in the right direction in terms of enhancing consumer welfare, the proposed bills did not fully consider concerns of the content industries regarding unprecedented levels of copyright infringement that might result from such resales. As I will explain in Chapter 5, when a "forward-and-delete technology" was first discussed in the above-mentioned bills, people were not sure whether that technology was even feasible. More importantly how to implement that particular technology was not sufficiently discussed either within or outside the Congressional forum. Architecture-only solutions that do not fully consider sociopolitical contexts are necessarily limited in terms of their feasibility in society. Therefore, a holistic approach to policy research that considers all concerned modalities is recommended.

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a digital or other nonanalog format, or any person authorized by such owner, sells or otherwise disposes of the work by means of a transmission to a single recipient, if the owner does not retain the copy or phonorecord in a retrievable form and the work is so sold or otherwise disposed of in its original format."

[35] S. 692 § 3(c)(5).

The Copyright Office's Recommendation

Various forms of media content are easily and cheaply copied and distributed due to the availability of Internet and digital media technologies. Moreover, some of the constraints that are latent in the technology involved in the copying of tangible property are not present in digital creative works. For example, one has to spend a considerable amount of time and expense to copy an entire book. However, digital copyrighted works can readily be copied and mass distributed at almost no cost and with no degradation over time. Thus, along with ever-developing digital technologies, the first sale doctrine can be seen as a threat to content industries, including Hollywood and Silicon Valley. Congress passed the Digital Millennium Copyright Act (DMCA) to make adjustments to the Copyright Act in light of these technological developments as well as potential implications for copyright holders. Since the Digital Millennium Copyright Act (DMCA), enacted in 1998, made it illegal to circumvent technical protection measures, some commentators have argued that Congress failed to give due weight to the issue of copyright balancing (e.g., Gillespie, 2007).

Many people argue that the U.S. Copyright Office has consistently sided with the copyright authors and content providers over the past several decades. As mandated by Section 104 of the DMCA, in 2001, the U.S. Copyright Office evaluated impacts of the copyright law and amendments on electronic commerce and technology developments

and recommended that Congress not expand the first sale doctrine to digital media.[36] In its report on digital first sale, the U.S. Copyright Office viewed an automatic "forward-and-delete" mechanism as not being practical, justifying their recommendation that the first sale doctrine not be applied to the digital realm. The office was concerned about those who do not delete their copies after selling or transferring ownership of copies to others.

As described below, the Copyright Office gave weight to the economic incentive argument presented by the content industry and recommended not adopting the digital first sale doctrine:

> Physical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work. Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner's market, no longer exists in the realm of digital transmissions. The ability of such "used" copies to compete for market share with new copies is thus far greater in the digital world. (DMCA Report, 2001, pp. 82-83)

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36 U.S. Copyright Office, DMCA Section 104 Report (Aug. 2001), available at: http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf

Kirtsaeng v. John Wiley & Sons, Inc. (2013)

After noticing large price differences between textbooks sold in the U.S. and textbooks sold in Asia, Supap Kirtsaeng asked his relatives and friends in Thailand to purchase copies of foreign edition textbooks published by John Wiley & Sons and to send them to him. He intended to sell these imported books online to help defray his living expenses and educational costs. He sold them through online marketplaces such as eBay. John Wiley & Sons filed a suit against Supap Kirtsaeng, arguing that Section 109 did not apply to this case because Section 602 (a)(1) states that "Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106…."

Imposing statutory damages of $600,000 ($75,000 per work) on Kirtsaeng, the U.S. Ninth Circuit Court of Appeals held that the first sale doctrine did not apply to "foreign-manufactured goods" even though those goods were produced with the copyright owner's permission. On appeal, the Second Circuit supported the District Court's decision. Kirtsaeng appealed to the Supreme Court, pointing out that there is disagreement among appeals courts with regard to the interpretation of Section 109 of the Copyright Act.

The Supreme Court was asked to address the question of whether "lawfully made under this title" imposes a geographical limitation with regard to the applicability of the

first sale defense. The Supreme Court held that the first sale doctrine did apply to copies of copyrighted works produced in foreign countries as long as they were manufactured in accordance with the U.S. Copyright Law. Before the decision, it was unclear whether the doctrine applied to a copyrighted work lawfully made abroad.

The Supreme Court noted that 1) "geographical interpretations create more linguistic problems than they resolve," 2) "[b]oth historical and contemporary statutory context indicate that Congress, when writing the present version of §109(a), did not have geography in mind," and 3) the Supreme Court is subject to interpret a statute in a way that retains the essence of the common law when the statute deals with issues previously ruled by the common law (*Kirtsaeng* v. *John Wiley & Sons, Inc.*, 2013). The majority opinion of the Supreme Court held that if "under this title" included geographical limitation, it would cause a "parade of horribles." Section 109 had used the same phrase in two additional places, and other provisions of the U.S. Copyright Law also included the same phrase. Thus, interpreting "under this title" to include geographical limitations caused problems in terms of consistency within the U.S. Copyright Law.

An *amici curiae* brief, submitted to the *Kirtsaeng* Court by 25 intellectual property law professors, also noted that §109(a) should be read in accordance with the doctrine's historical and statutory contexts which disfavor imposing constraints on "the customary rights of legitimate owners of non infringing copies to use and sell those copies" (*Kirtsaeng* v. *John Wiley & Sons, Inc.*, 2013, p. 3). Moreover, the brief pointed out that interpreting section 109 as having geographical limitations could get libraries, secondhand book stores, computer companies, and museums in trouble by limiting their

ability to fulfill their missions. For example, if section 109 were interpreted as not applying to foreign-made products, libraries would not be able to lend books to patrons unless they received permission in advance from the copyright owner.

In sum, the Supreme Court reasoned that interpreting Section 109 as it did was reasonable from a linguistic perspective. It was also reasonable given statutory and historical contexts and in terms of respecting the common law tradition that disfavors imposing restrictions on subsequent transactions of copyrighted works after their initial distribution. It should be noted that the *Kirtsaeng* case, which addressed cross-border transactions, still concerned physical objects (paper books). Although this case did not address the online transmission issue of the first sale doctrine, "it could have an impact on the ability of right holders to offer their works at different prices and different times in different countries, and may result in legislative reexamination of the doctrine as a whole" (U.S. Department of Commerce, 2013, p. 37).

Capitol Records, LLC v. ReDigi Inc. (2013)

The implication of the *Kirtsaeng* case does not extend to the resale of digital goods. To date, no first sale case has been reported in the context of ebooks. The first case exploring this issue returns to the fraught environment of digital music, a domain that had been rocked by other problems related to digital and Internet-based copying

schemes in the Napster and Grokster cases.[37] The legality of reselling digital goods was debated in the *ReDigi* case, specially addressing the MP3 format as one instance of the digital form. When it comes to copyrighted *physical* works, the doctrine has been applied without great difficulty. However, the digital environment poses a number of questions pertaining to the applicability of the doctrine to that domain.

Established in 2011, ReDigi, an online marketplace for preowned digital music files, allowed its users to sell their legally purchased digital music files and buy other used digital music files from other users. When a user sold her file, she would earn 20% of the sale price, while another 20% was allocated to an "escrow" fund for artists, with ReDigi retaining 60%. This process functioned like a second hand record store. In the transactions, sellers of digital files received credit for future purchases so that no money changed hands. ReDigi argued that "ReDigi's structure ensures that no copies of an eligible file are made when one ReDigi user sells an Eligible File in the user's Cloud Locker to another ReDigi user through the ReDigi Marketplace."[38] The online marketplace for pre-owned music files established a mechanism that accessed the user's computer and checked to make sure music files were legally purchased and that the user had not kept copies of those files on her computer after transferring the files.

Capitol Records contended that ReDigi's activities were not compatible with copyright laws. Capitol claimed that uploading music files necessarily involved

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37 A&M Records, Inc. v. Napster, Inc., 239 F. 3d 1004 (2001), MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

38 Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 9-12, Capitol Records LLC v. ReDigi Inc., Case No 12 Civ 0095 (RJS) (SDNY 27 January 2012).

reproduction and thus violated Capitol's exclusive reproduction right. In addition, Capitol argued that MP3 files in the *ReDigi* case were not "material objects" and further pointed out that ReDigi did not purchase those files (Plovnick, 2012, p. 44). Capitol contended that all of those factors disqualified ReDigi from using the first sale doctrine as a defense.

The *ReDigi* court held that ReDigi was liable for copyright infringement. According to the court's logic, the first sale doctrine was not applicable unless the hard drive itself was transferred to the new lawful owner of the digital files. The court said that "the plain text of the Copyright Act makes clear that reproduction occurs when a copyrighted work is fixed in a new *material object*" (*Capitol Records, LLC v. ReDigi Inc.*, 2013, p. 5, emphasis original). It did not matter whether only one file existed during the file transfer process in determining ReDigi's violation of the copyright owner's exclusive reproduction right. In other words, *ReDigi* court's logic is that digital transfers amount to reproduction regardless of the number of copies in existence.

The *ReDigi* court held that if a file is moved from one place to another, a reproduction occurred. ReDigi tried to refute this conclusion by resorting to the 1973 case of *C.M. Paula Co. v. Logan*, wherein the defendant lifted images from greeting cards with the help of chemicals and placed those images on ceramic plaques for sale. The court held that the defendant was not infringing on the copyright holder's reproduction right because "should defendant desire to make one hundred ceramic plaques…, defendant would be required to purchase one hundred separate…prints" (*C.M. Paula Co. v. Logan*, 1973, p. 191). In a similar way, ReDigi users had to buy a digital music file in order to make a sale and ReDigi terminated the seller's access to that particular file after

the file was transferred. Regardless of the similarity between the two cases, the *ReDigi* court rejected that argument without any further explanation of what fundamental differences existed between the two cases, saying simply "no new material object was created" (*Capitol Records, LLC v. ReDigi Inc*., 2013, p. 7).

It is worth noting that Canada takes a different approach regarding a copyright holder's reproduction rights. The Supreme Court of Canada held that transferring a copyrighted work from one medium to another does not violate the copyright owner's reproduction right if only one copy is left in the end (*Théberge v. Galerie d'Art du Petit Champlain Inc*., 2002). While Canada has developed its own Copyright Act, which differs from that of the U.S., Canada has also adhered to the Berne Convention for Protection of Literary and Artistic Works and other international treaties regarding copyright protection. Thus, the Canadian Supreme Court's narrow interpretation of reproduction presents implications for the United States. Chapter 6 considers the "forward-and-delete" technology as one of the technological solutions for justifying a digital first sale doctrine, following the logic of the Canadian Supreme Court's decision on the reproduction issue and granting more practical feasibility to technology advances.

The decision in the Canadian case holds significance for both the resale of digital goods and the future of cloud-based computer services that enable users to transfer their digital files (Plovnick, 2012). It should be noted that as long as digital transfers are considered as infringing on copyright by producing a reproduction, regardless of the number of copies in existence, most of digital transfers can constitute copyright infringement, meaning that a viable digital first sale doctrine and cloud-based

technological innovations are not likely to be accomplished. As I explain in Chapter 6, even though a digital first sale doctrine applies to digital goods, temporary reproduction issues should be resolved in order to make a digital first sale doctrine viable in the marketplace. It is also worth noting that in the case of *UsedSoft GmbH v. Oracle International Corp*. (2012), the Court of Justice of the European Union ruled that the exhaustion principle applies to both physical objects and downloaded software, making it legal to resell used software licenses in the second-hand market.[39] The debate over the resale of digital goods is far from over and the public debate over a digital first sale doctrine is still in its early stages. In July 2013, the U.S. Department of Commerce's Internet Policy Task Force published a Green Paper on "Copyright Policy, Creativity, and Innovation in the Digital Economy," providing insight on the need to address a digital first sale doctrine issue as well as other digital copyright issues.[40] Although this Green Paper called for the need to further develop policy on several issues including a digital first sale doctrine, it did not provide any conclusion on a digital first sale doctrine but recommended the Department seek further public comments and hold multi-stakeholder dialogue. In response to the call for seeking public comments, the U.S. Department of Commerce sought public comment from various stakeholders with regard to the scope and relevance of the first sale doctrine in the digital environment context.[41] As part of

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39 UsedSoft v. Oracle (C-128/11). See http://curia.europa.eu/juris/document/document.jsf?text=&docid=126527&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=212863

40 http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf

41 See http://www.ntia.doc.gov/federal-register-notice/2013/request-comments-department-commerce-green-paper-copyright-policy-creat

this effort, the U.S. Department of Commerce's Internet Policy Task Force hosted public roundtable discussions in cities across the country concerning digital copyright policy, including the digital first sale doctrine.[42]

POLICY OUTCOMES OF THE DOCTRINE

As highlighted in Chapter 2, the first sale doctrine applies only to distribution rights for copies and consequently is examined here in terms of how distribution markets function. First, the doctrine plays a critical role in improving the public's access to copyrighted works at greater affordability and availability (Perzanowski & Schultz, 2011; Reese, 2003). The existence of secondary goods facilitates competition between copyright holders who produce new products and secondary market players, such as used bookstores or online auction sites like eBay. The existence of these latter markets in turn puts pressure on copyright holders to lower the price of their products due to price competition.[43]

Second, those who purchase new products at a high price also can recoup some of their investment by selling those products later. Hence, when those markets function well, copyright holders cannot form a monopoly in the market because consumers have other options. Secondhand markets, including movie and video game products, still

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42 See https://www.federalregister.gov/articles/2014/04/16/2014-08627/notice-of-public-meetings-on-copyright-policy-topics-as-called-for-in-the-department-of-commerce

43 It should be noted that there is a debate about whether overall lower prices are a good thing in terms of incentivizing market innovation and seeking ultimate consumer welfare. However, in the context of the first sale doctrine, one matter is clear: the existence of lower-tiered prices can allow those who cannot pay for original products at a higher price to access cultural works, and this benefit should not be disregarded.

generate substantial revenues. As of November 2012, nearly 40% of GameStop's revenue came from used game products (Team, 2012). In 2013, Redbox, the nation's largest DVD, Blu-Ray, and game rental business, earned $1.97 billion (Fritz, 2014). Redbox's business model would be impossible without the first sale doctrine. In short, the doctrine helps consumers benefit from secondary markets that would not otherwise exist, which eventually contributes to the development of a broader market economy by creating new sectors.

Third, preservation of copyrighted works, such as literary works, could be hampered if the first sale doctrine did not exist (Perzanowski & Schultz, 2011; Reese, 2003). The doctrine limits the copyright holder's right over subsequent dispositions of her work. This means that creative works already available on the market are likely to exist elsewhere over time regardless of copyright holders' interest in keeping it in publication. When authors and publishers do not want to republish out-of-print books anymore or when they have to retrieve books for various reasons, the first sale doctrine insures that such books are still available.

Fourth, privacy can be better protected due to the existence of the doctrine (Perzanowski & Schultz, 2011). Consumers do not have to disclose information about subsequent transactions about the product or their use of it. Video rental businesses have existed due to the doctrine and relevant laws, such as Video Privacy Protection Act of 1988, that were enacted to protect consumers' privacy against unauthorized data collection. If consumers have to get permission from the copyright holder before they

resell or lend copies of copyrighted works, their privacy cannot be protected.[44] For example, people who bought vulgar novels or books might want to protect their anonymity when transferring ownership of those books.

Fifth, the doctrine is useful in terms of enhancing transactional clarity. Market participants benefit from the doctrine through reduced information and transaction costs because successive purchasers of a copy of a copyrighted work can "lawfully" own the work without identifying and negotiating with the copyright owner. If a purchaser were required to check all terms and conditions and copyright ownership of copyrighted works, the purchaser would face high costs to purchase a copyrighted work in the market that would result in fewer market transactions. Consumers should be able to purchase copyrighted works directly, trusting the fact that the original copyright holder's control over the disposition of his or her work is prohibited.

Finally, some commentators argue that first sale promotes both innovation and platform competition (Hess, 2013; Perzanowski & Schultz, 2011). They argue that copyright holders are likely to make efforts to compete with secondary markets that sell used goods as their products. Such competition can bring innovations to market. Consumer lock-in takes place "when the costs of switching to a new vendor or technology platform are sufficient to discourage consumers from adopting an otherwise preferable competitive offering" (Perzanowski & Schultz, 2011, p. 900). The first sale doctrine reduces consumer lock-in with respect to device platforms by enabling

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[44] In addition, it is very likely that copyright holders would have no incentive to process these permission requests in the first place, which already raise issues with regard to fair use exemptions.

consumers to resell past purchases and recover a portion of their initial investment when switching to a new platform and by encouraging secondary markets that can affect the market price of new platforms (Perzanowski & Schultz, 2011). For example, when a consumer, who has enjoyed Sony's video game console Playstation, wishes to switch to Microsoft's Xbox console, if she spent a lot of money on purchasing software and hardware from Sony, it might be a hard decision for her to switch to Microsoft's Xbox. However, if she can resell her video games on a secondary market, such as eBay, and recover a large portion of her previous investment, then her decision to switch to Microsoft's system might be easier. In determining the benefits of this aspect of the doctrine, interoperability issues need to be considered. As discussed earlier, barriers to compatibility between devices, imposed by device makers and content distributors, can limit the doctrine's effects through consumer lock-in.

THEORETICAL RATIONALES FOR THE FIRST SALE DOCTRINE

Copyright is a government-granted limited monopoly, and the first sale doctrine is a limitation to the monopoly given to the copyright holder. In recognition of the need to limit the copyright holder's monopoly, the U.S. Congress introduced the first sale doctrine in the Copyright Act. Subsequently, scholars and courts have adopted, often implicitly, the rationale that underlies theories discussed below to explain the first sale doctrine. The theories reviewed below—the "Just Rewards" Theory, the Theory of Transaction Protection, and the Ownership Theory—commonly acknowledge that the monopoly of copyright owners should be limited and that balancing interests between the

public's wide access to and use of copyrighted goods with those of the copyright holders is a good thing.

However, the theories, which can be found in U.S. court decisions pertaining to the first sale doctrine, fail to provide an overarching and cohesive explanation for their necessity. That is, missing from the theories is a normative framework that explains why that particular theory ought to exist. This dissertation, therefore, seeks to explain cultural democracy in the U.S. relative to the context of the first sale doctrine. That is, theoretical justifications for copyright protection have been actively discussed by U.S. scholars. However, conversations about the theoretical rationales used to justify the first sale doctrine have been largely overlooked in favor of considerations that center mostly on policy effects of the doctrine. By contrast, in Germany and elsewhere, the theoretical rationales discussed in this chapter have been raised (Ahn, 2004).

The U.S. legal system and the German legal system stem from two starkly different traditions. The civil law system of Germany, also used in Korea which drew heavily from the German model, is based on statutory law while the legal system of the U.S. is derived from common law. Under the common law system, judges' decisions play a significant role in making laws based on precedent, and courts are usually expected to follow the reasoning developed and adopted in relevant precedents. Subsequent to significant judicial doctrines, complementary statutory law is often enacted. By comparison, in a civil law system, the role of judges is largely limited to applying the provisions of a codified set of laws, based on their judgment of the facts of the case.

A cautious argument can be made that differences in the degree of interest paid to specialized theory regarding the first sale doctrine can be explained by differences in the two legal system (i.e., common law v. civil law). Hence, for example, the U.S. Supreme Court's 1908 decision in the case of *Bobbs-Merrill Co.* v. *Straus* laid the groundwork for legislative efforts to adopt the first sale doctrine but was not the single factor that led to enactment.

It is important to note that the three theories have been largely developed in Germany. Given that the focus of this dissertation is to investigate the applicability of the first sale doctrine to digital goods in the context of the U.S. system, my discussion about the three theories is intentionally brief. Having said that, after reviewing those theories, I explain why having an overarching normative framework is important. In Chapter 5, I show in what ways a cultural democracy framework can justify the first sale doctrine in the context of copyright law.

The "Just Rewards" Theory[45]

Courts have examined the balancing of interests of inventers with those of the public. In 1895 in the case of *Keeler v. Standard Folding Bed Co*., the U.S. Supreme Court ruled that lawfully purchased patented products become "the absolute, unrestricted property of the purchaser, with the right to sell as an essential incident of such ownership."[46] As Diacovo (1994) noted, "it is important that once the patentee receives

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45 This theory is called "Belohnungstheorie" in German (Ahn, 2004).

46 Keeler v. Standard Folding Bed Co., 157 U.S. 659, 664 (1895).

his 'just reward,' the patented product passes outside the scope of the monopoly" (p. 61). The same logic can be applied to copyright law, given that copyright law was developed to balance the interests of the copyright holder and the interests of the public.

Similar reasoning was applied in the early 20th century case of *Bobbs-Merrill Co. v. Straus*, where the U.S. Supreme Court recognized the notion that "the nature of the property and the protection intended to be given the inventor or author as the *reward* of genius or intellect in the production of his book or work of art" (*Bobbs-Merrill Co.* v. *Straus*, 1908, p. 347, emphasis added). Often the term "return" has been used instead of reward, when discussing economic incentive for creators. For example, Emanuel Celler, former Representative in Congress from the State of New York and chairman of the House Judiciary Committee, said in the context of revising the Copyright Law of 1909 that included exemptions for "coin-operated machines":

> Since 1946 our Committee on the Judiciary has had primary legislative jurisdiction, under the rules of the House, of all measures affecting copyrights. Our committee thus shoulders the solemn responsibility of guarding the intellectual property of authors and composers and making sure, in an increasingly complex society, that American creative talent will continue to receive encouragement in the form of *just return* from the commercial exploitation of its works. (cited in Hanson, 1968, E17, emphasis added)

The "just rewards" theory, when applied to copyright-related cases, claims that if the copyright owner was rewarded from his or her first disposition of the copyrighted work, the copyright owner has no reason to control subsequent dispositions (Choderker,

1999; Diacovo, 1994; Moon, 2014). In the U.S., this theory has been supported on the grounds that it is well in line with the original purpose of the copyright law to seek a balance between the rights of copyright holders and copy owners (Moon, 2014). Under the "just rewards" theory, the subsequent purchaser should be entitled to resell the copyrighted work, given that the copyright owner has already been rewarded from the initial sale. There is an underlying notion that allowing the copyright owner to continually benefit from the product is not just. As noted above, this theory is also well suited to patent law which was developed to promote innovation.

Theory of Transaction Protection[47]

The treatment of first sale has developed in connection with property law frameworks. In the case of *Kirtsaeng* v. *John Wiley & Sons, Inc*., the U.S. Supreme Court clarified that the first sale doctrine is rooted in "the common law's refusal to permit restraints on the alienation of chattels"[48] (*Kirtsaeng* v. *John Wiley & Sons, Inc*., 2013, p. 1363).[49] The theory against restraint on alienation of property is not just for the first sale doctrine itself but applies also to any issues relating to tangible property (Diacovo, 1994), given that alienability is an essential element of tangible property. To ensure that markets function properly and, in turn, that the welfare of society is achieved, the purchaser of a

47 This theory is called "Verkehrssicherungstheorie" in German (Ahn, 2004).

48 The alienation of chattel refers to transferring title of a tangible property.

49 In property law, alienation refers to "the transfer of the property and possession of lands, tenements, or other things, from one person to another" (see http://thelawdictionary.org/alienation/). "Alienation of intellectual property can take one of two basic forms. The first is its entire alienation by selling, at one time, all rights to the property. The second is the complete alienation of copies of the property with limitations on how those copies may be used: the selling of copies of copyrighted works, objects displaying trademarks, or licenses to use patented technology" (see http://cyber.law.harvard.edu/bridge/Philosophy/88hugh4.txt.htm).

copyrighted tangible object should be entitled to exercise the right of alienation (Choderker, 1999). This rationale of free alienability has served well in property law, given that putting restraints on alienation of property can be considered an intrinsic limitation to the stream of commerce (Moon, 2014; Singer, 2006).

This principle underscores the idea that the utility value of a tangible copyrighted object would be substantially diminished if the object's original owner was the only individual who could exercise control over it, not allowing subsequent purchasers or society as a whole to benefit from that work (Choderker, 1999). As the U.S. Supreme Court stated in *Dr. Miles Medical Co. v. John D. Park & Sons Co*., the right of alienation "is one of the essential incidents of the right of general property in movables, and restraints upon alienation have generally been regarded as obnoxious to public policy, which is best served by great freedom of traffic in such things as pass from hand to hand."[50] Thus, this theory is well suited to the English common law tradition that abhors restraints on alienation of property (Diacovo, 1994).

Ownership Theory[51]

The idea of ownership is a residual category that many have looked to in order to resolve distribution rights. According to this theory, the first sale doctrine is needed in order to resolve the tension between a copyright holder's distribution right and a copy owner's property ownership of the copyrighted work. This theory claims that transferring ownership of a copyrighted work should naturally entail the process of extinguishing the

50 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911).

51 This theory is called "Eigentumstheorie" in German (Ahn, 2004).

copyright holder's right of distribution. However, this theory has been criticized on the ground that ownership and copyright protect intrinsically different subjects (Ahn, 2004).

Some commentators criticize this theory further on the ground that copyright law protects creative expression but not a physical copy that embodies the copyrighted expression; therefore, property ownership does not necessarily conflict with the copyright holder's distribution right (Ahn, 2004). According to this criticism, given that there exist no conflicting legal interests between an owner of a copyrighted material object and a copyright holder, to seek a rationale for the first sale doctrine from the avoidance of a conflicting situation is unreasonable. Section 202 of the 1976 Act states that "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied." Even in Germany where that theory was first introduced, it did not gain traction (Kim, 2013).

CALL FOR A NORMATIVE COPYRIGHT THEORY

Some commentators have used the "just rewards" theory or the theory of transaction protection to explain the necessity of adopting the first sale doctrine (see Ahn, 2004; Choderker, 1999; Diacovo, 1994; Moon, 2014), while the majority of U.S. legal scholars have made arguments for the first sale doctrine based on the doctrine's socially desirable outcomes. However, the above noted theories in this chapter can be considered "*empty formalism*," which by themselves convey next to nothing about what the law ought to be. Although each theoretical justification provides its own logical outcomes—with the exception of ownership theory—the justifications do not explain why a

particular theory is needed. The justifications do not substantially explain why a certain theory is desirable in the context of intellectual property in general, and copyright protection in particular. A normative legal theory should be able to answer what the law ought to be. In that regard, normative copyright theories discussed in Chapter 2 should have something to say about the first sale doctrine. Before applying the notion of cultural democracy to the first sale doctrine, Chapter 3 has sketched a portrait of the judicial history and legislative responses to the first sale doctrine to date. The history of the first sale doctrine reviewed in this chapter shows that when it comes to physical copyrighted works the first sale doctrine has served as a tool to balance copyright holders' rights and copy owners' rights. When applied to physical copies, the underlying rationale of the doctrine, which does not allow copyright owners to control downstream distribution of his or her work, has been supported without any difficulty. However, this balancing mechanism has been challenged by unique features of digital works, such as easy copying, perfect copy, non-degradability, and risk of piracy, that have raised questions regarding how to address the content industry's concerns while preserving the policy outcomes of the first sale doctrine in the digital age.

CONCLUSION

Chapter 3 has shown that the cost-benefit market calculation backed by the economic incentive framework has prevailed at Congressional hearings that considered issues of the first sale doctrine. Given that copyright holders have, for the past few decades, sought ever-stronger copyright protection, it is more crucial than ever to draw

upon a normative theory that can problematize a dominant understanding of copyright protection and suggest an overarching framework for copyright reforms.

It is important to note, as shown in the *ReDigi* court, the courts are not likely to take an active role in expanding the application of the first sale doctrine to digital goods. The *ReDigi* court said: "…the first sale doctrine was enacted in a world where the ease and speed of data transfer could not have been imagined…It is left to Congress, and not this Court, to deem them outmoded" (*Capitol Records, LLC* v. *ReDigi Inc*., 2013, p. 656).

As discussed in Chapter 3, the U.S. Supreme Court and lower courts have relied largely on precedents to justify the doctrine's viability (Even, 2009), and across cases one notable penetrating rationale with regard to the first sale doctrine has been an abhorrence to restrict a transfer of a copy. Also, as shown in the *Bobbs-Merrill* case and elsewhere, a similar rational has been set forth to support the "just reward" theory. However, it is difficult to determine what "just reward" means and, especially, what the term "just" means in that context.

In sum, theoretical justifications that have been used to explain the need to adopt the first sale doctrine do not fully address the question of what a desirable law ought to be, as pertains to intellectual property rights and copyright protection. Therefore, this dissertation argues that normative theories in copyright are essential for the purpose of guiding much needed copyright reforms in the digital age. Chapter 4 will examine the specific case of ebooks as a way to demonstrate how copy owners' experience with ebook usage has been limited by various socio-cultural and market factors. Based on this

positive evaluation, in Chapter 5, I will explain how the distribution and cultural goals of copyright can be better accomplished by resorting to the notion of cultural democracy.

Chapter 4: The Politics of Ebooks

> *In our country's first year of war, we have seen the growing power of books as weapons…*
>
> *This is proper, for a war of ideas can no more be won without books than a naval war can be won without ships. Books, like ships, have the toughest armor, the longest cruising range, and mount the most powerful guns. I hope that all who write and publish and sell and administer books will…rededicate themselves to the single task of arming the mind and spirit of the American people with the strongest and most enduring weapons*.[52]—Franklin D. Roosevelt

The Internet and digital technologies mediate modern life, enabling individuals to access information without geographical and temporal constraints and at relatively low cost. Nevertheless, these "distributive gains" are limited (Baker, 2007, p. 122). Especially in the Internet age, audience attention is concentrated and arrested by media content generated by a few corporate entities (Baker, 2007). That is, media concentration goes against furthering democracy by limiting the variety of culturally diverse voices and perspectives (Baker, 2007). In addition, sundry impacts of market innovations through technological developments have been sidestepped by endless efforts of content industries to make profits from new areas of innovation. As I explain in Chapter 5, copyright holders have relied on the justification of economic efficiency framework

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52 President Franklin D. Roosevelt's remarks were cited in Frederick Stielow's essay, *Reconsidering arsenals of a democratic culture* (see Stielow, 2001, p. 11).

whenever they needed to step into new areas of innovation and recapture their revenue by controlling how their creative works are circulated and consumed by users. This chapter considers how one especially significant category of media content, the book and the ebook, functions against the backdrop of corporate concentration and digital technologies.

Notwithstanding the iconic and historical value of books embedded in the democratic principles of the U.S., relatively little is known about whether the publishing industry is furthering or hampering the foundation of democracy, what President Franklin D. Roosevelt envisioned as the "task of arming the mind and spirit of the American people" (as cited in Stielow, 2001, p. 11). Especially, little is known with regard to the long-term effects of moving to an electronic form of books, even though various forms of electronic publications have become ubiquitous and appear to inexorably usurp the dominance of the hardcopy page.

One of the primary purposes of this dissertation is to advocate the democratic value of copyright law, a purpose that includes promoting "expressive diversity" and furthering "public education," among others (Netanel, 1998). I argue that in the age of licensing and ever-strengthening copyright protection, it is significant to recognize the problem of diminishing rights for consumers, particularly copy owners. The applicability of the first sale doctrine to digital goods relates directly to the balancing of copyright issues. This dissertation argues that the balancing mechanism should be sustained in the digital age.

Once the significance of the topic of ownership rights is recognized, it is important to examine how contemporary issues pertaining to copyright law either advance or limit those rights. The viability of the first sale doctrine in the digital age is one of the key issues that warrants further investigation. While various focal points can be chosen to undertake an investigation, this dissertation focuses on ebooks to explore the applicability of the first sale doctrine to digital goods.

As noted above, notwithstanding the iconic value of ebooks in furthering democratic principles, insufficient attention has been paid to the following question: What political and social factors have shaped the current economic conditions and copyright regime with regard to ebooks? Cultural democracy advocates the decentralization of cultural meaning-making processes and promotes ordinary citizens' active participation in cultural meaning-making processes.

To achieve "a more democratic distribution of communicative power within the public sphere and safeguards to the democratic system" (Baker, 2007, p. 53), one might question the tendency of media concentration and other factors that might invisibly impact democratic values of the American society. With respect to books, institutions such as libraries, and more generally the act of reading and literacy along with the terms—devices, availability, formats, sharing options—under which people access books all constitute important elements of a democratic system considered essential to preserve and extend knowledge fundamental to the bedrock of democracy and citizenship.

As of January 2014, the percentage of American adults over 18 who read an ebook in the past year was 28 percent (Pew Research Center, 2014). According to a

report from Nielsen Books & Consumers, in the first half of 2014, ebook sales in the United States accounted for 23 percent of total consumer book sales (Abrams, 2014). The popularity of ebooks is radically changing the relationships between stakeholders including publishers, retailers, and libraries as well as ebook users and library patrons. Such a shift raises questions about the social, political, and economic factors at play in the transition from printed books to ebooks.

Ebooks can be defined as a combination of hardware and software working together for the purpose of serving people's reading habits (Morgan, 1999). Morgan (1999) distinguishes ebooks from e-texts, which refer to hypertext markup language that can be viewed on a computer. More inclusive is Hawkins's (2000) definition that defines ebooks as any book in its electronic form. Rao (2003) defines ebooks as "text in digital form, or digital reading material, or a book in a computer file format, or an electronic file of words and images" (pp. 86-87).

In this chapter, I lay out first a brief history of the development of the ebook and then explore salient characteristics and implications of the ebook ecosystem through the lens of Lessig's (2006) four modalities of regulation. Changes in one modality, according to Lessig, can cause changes in the other modalities. All four constraints, namely law, markets, social norms, and architecture, should be considered holistically when examining new technologies such as the ebook, rather than grappling merely with the language in the law (Lessig, 2006). This chapter seeks to broaden and deepen our understanding of the politics of ebooks by addressing the factors that have shaped the current ecosystem of ebooks and examining how these factors affect how people can

obtain and use ebooks, what they can do with them, etc. This chapter demonstrates reasons to adopt a digital first sale doctrine with regard to people's use of ebooks. Understanding how the current ebook ecosystem is being shaped by various socio-political and economic factors is important in order to come up with a normative vision that can guide discussions about copyright reform.

A BRIEF HISTORY OF EBOOK

The idea of a portable electronic book dates back to before World War II (Manley & Holley, 2012). In his 1945 essay "As We May Think," Vannevar Bush recognized the need for personal computers to be able to store increasing amounts of information to make it possible to read at one's convenience (Manley & Holley, 2012). The origin of the ebook is closely related to the development of early computers and to newer technologies that have enhanced ebook usability. However, it was not until the 1970s that the idea of a notebook-sized computer began to take form (Manley & Holley, 2012).

Around the same time that ebook hardware was in its embryonic stages, Michael Hart in 1971 launched Project Gutenberg, a digital library for books that belong to the public domain.[53] By addressing technical issues of digitizing books, Project Gutenberg, along with other similar endeavors, played a significant role in the development of the ebook. Project Gutenberg was launched with the visionary goal of enabling people to

53 Litman (1990) defines the public domain as "a commons that includes those aspects of copyrighted works which copyright does not protect" (p. 968).

gain access to a digital library at no cost. That project has continued to develop and evolve since the Internet went live in 1974 (Lebert, 2009).

The number of books published in digital format continues to soar. As of 2014, the Project was offering more than 49,000 free ebooks and the voluntary initiative continues to spread across the globe. Books in the collection are available either on ereaders or computers. Additionally, people can access more than 100,000 free ebooks through the Project's partners and affiliates. All the free ebooks that Project Gutenberg provides are available to the public with the help of thousands of volunteers who value the ideal of free and equitable access to literary cultural works (Widdersheim, 2015).

Indeed, Project Gutenberg's ebook efforts embody the utopian dream of making books freely available to all, no matter where the books are located. Coupling the promises of Internet freedom and an almost countercultural devotion to public goods (Streeter, 1999; Turner, 2006), Project Gutenberg represents a halcyon promise of the Internet's collaborative benefits. Having said that, the ever-shrinking scope of public domain, coupled with the continued broadening of copyright protection, poses a threat to the future of Project Gutenberg.[54] The trajectory of the ebook is, therefore, something like a "canary in the coal mine" for considering how the social benefits of copyright can be sidestepped by content creation industries.

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54 Although the scope of the public domain has been shrinking due to the copyright extension, as noted above, efforts by volunteers, partners, and affiliates that agree with the project's mission to make books available for free have grown so that the number of free ebooks available through Project Gutenberg's website, partners and affiliate institutions have also increased.

Consider another promising project, the Google Books Library Project, launched in 2004. Initially greeted with optimism and securing the collaboration of prominent academic libraries, Google launched a massive scale project to scan books in partnership with libraries and to make digital versions of those books available to the general public for reading and purchasing (Helft & Rich, 2008). This utopian vision later was subject to criticism on grounds that the tech giant's intention was commercialization of that massive book repository since Google allowed the public to read only about 20 percent of the texts for free; additionally, Google made little or no effort to correct any errors in its digitized products. Thus, it comes no surprise that authors and the publishing industry raised copyright infringement lawsuits against Google.[55]

Consider another example surrounding an effort to sidestep proprietary technology with regard to ebooks and its relationship to copyright law. Adobe Systems Inc. invented the Portable Document Format (PDF) which was first released in 1993; the PDF is currently used as one of the ebook formats. As an early market innovator in the ebook ecosystem, Adobe Systems introduced the Adobe eBook Reader in January 2001. Like other software companies leading market innovation, Adobe Systems also

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[55] In November 2013, the United States District Court for the Southern District of New York ruled that Google's project to scan more than 20 million books from libraries without the permission of copyright holders can be considered as a fair use. After reviewing the four factors used to determine whether a particular use of a copyrighted work is a fair use, then Judge Denny Chin said that "In my view, Google Books provides significant *public benefits*. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders" (*Authors Guild et al. v. Google,* 2011, p. 26, emphasis added). Available at http://www.copyright.gov/docs/massdigitization/statements/gbs_opinion.pdf

implemented a Digital Rights Management (DRM) system on its Adobe eBook Reader to prevent users' uncontrolled use and circulation of ebooks.

In the same year that Adobe System introduced its eBook reader with DRM technology, a Russian company, ElcomSoft, released its Advanced eBook Processor, known as AEBPR (Postigo, 2012) that allowed its users to circumvent copy protection measures of the Adobe Acrobat eBook Reader software. Later, Dmitry Skylarov, a programmer who worked at ElcomSoft, the Russian company, was arrested and prosecuted by the U.S. government on charges of violating the Digital Millennium Copyright Act (DMCA). That case was recorded as the first criminal lawsuit for violation of the DMCA that was enacted in 1998 (Ardito, 2001). The arrest of Sklyarov boosted a pre-existing controversy about the U.S. government's approach to digital copyright issues by demonstrating ways the DMCA can be used to negatively influence free speech, thereby increasing unfavorable attitudes by the general public and copyright activists toward the DMCA (Postigo, 2012). Media reports that described the use of the DMCA for criminal prosecution along with public awareness of this issue empowered activist groups and hackers to pursue issues of freedom of speech and fair use rights. That incident demonstrates that ways for distributing cultural works and resources are commonly related to copyright law. The distribution of ebooks is no exception.

Both Google Books Library Project and the arrest of Skylarov illustrate how the utopian vision of making books freely available has been hampered by the content industry's efforts driven to maximize profits. An accompanying tactic has taken shape as licensing agreements which enable copyright holders to maximize gains from their

creative works by retaining ownership over their works and not allowing consumers to actually "own" digital content. These initiatives directly counteract the early assumptions about a world of books being made universally and freely available to all populations.

The development of ebooks has been propelled mainly by two industries: hardware manufacturers that produce ebook readers and content providers that publish specific formats that enhance their proprietary interests (Henke, 2001). The enactment of the Digital Millennium Copyright Act (DMCA) and the strengthening of copyright protection have facilitated development of proprietary formats that limit users "to their ebook inventory and readers and [make] it impossible to sell ebooks through the doctrine of first sale because the ebooks are licensed rather than purchased" (Manley & Holley, 2012, p. 300).

When it comes to ebook readers, eInk technology has played a significant role in the evolution of electronic readers. The eInk technology dates back to the late 1970s when it was introduced by Xerox (Merkoski, 2013). In 2003, Sony began to use this game-changing technology when in 2004 it launched the Sony e-reader. The company encountered various problems in Japan, such as a lack of available ebooks and the difficulty of rendering content in Japanese, so in 2006 Sony launched in the U.S. a new version of e-reader. In 2007, having learned valuable lessons from Sony's mistakes and building on its leverage of book transactions, Amazon launched the Kindle (Merkoski, 2013). The success of Kindle in the ebook market was accelerated by its having a network connection and other functions, such as an embedded cell phone (Merkoski, 2013). Many concerns and issues have been raised with regard to usability and price of

ebook readers, yet numerous devices for reading ebooks have been introduced, most eventually having been subsequently withdrawn (Manley & Holley, 2012). For example, Sony announced its withdrawal from the ebook reader market in the U.S. and Canada (Loveridge, 2014). Market speculation circulated that Barnes & Noble would close its Nook business, but it appears the company is still trying to save its Nook business (Wahba, 2015).

The Kindle rapidly expanded the ebook market (Pike, 2012a). Technologies surrounding ebooks have continued to develop and users' experiences have improved. In 2011, Amazon announced that its ebook sales exceeded those of hard-covers (Miller & Bosman, 2011, para. 1). According to reports from the Association of American Publishers, ebook trade revenues increased 5.1% to $404.8 million in the first quarter of 2014, representing a slowdown in ebook revenue in the U.S. that until 2013 had shown sharp increase ("Adult ebooks," 2013). Despite the recent slowdown, major U.S. publishers anticipate gains from ebooks and believe ebook revenues will drive overall growth. According to a recent report that surveyed 475 educators, the respondents suggest that K-12 classrooms materials are in transition from print books to digital books (Kozlowski, 2015), and indeed big publishers such as McGraw-Hill, Pearson, and Houghton Mifflin Harcourt, have made an effort to incorporate ebooks into formal curricula for K-12 schools. The ebook educational market will doubtless make huge contributions to publishers' revenues, particularly if these ebooks are licensed rather than offered for purchase.

The publishing industry has historically been challenged by shifts in consumer reading patterns in addition to technological challenges and innovations, market competition from both inside and outside of the publishing industry, and relevant laws and regulations. Thus, current issues facing the publishing industry are nothing new, yet the current chaotic situation associated with electronic publications is clearly disconcerting to the book publishing industry (Greco, Milliot, & Wharton, 2014).

In an effort to understand better the evolving ebook ecosystem, this study employs Lessig's (2006) theory of four modalities of regulation. This study poses the following questions: What are the social norms, market forces, architecture, and laws that shape how people use ebooks? And how, with regard to ebooks, have those modalities shaped the current political and economic conditions and the copyright regime?

LESSIG'S FOUR MODALITIES ANALYSIS

Lessig's (2006) theory of regulation provides a helpful framework for understanding the ecology that surrounds ebook development, also offering suggestions as to how the ebook future may unfold relative to society's existing social, economic, and regulatory choices.

Lessig (2006) proposes four distinct but interdependent modalities that play a role in regulating individuals' behavior and in shaping digital socio-technical systems. The four consist of the market, the law, social norms, and architecture. The basic premise of his argument, as reproduced in the title of his major book, is that "Code is law."

Although Lessig (2006) argues that the modalities work together in shaping one another, he directs attention especially to the architecture, which remains a mostly under-examined facet of many technological developments. The architecture refers to the combination of software and hardware that determines and structures how individuals interact with technology or that exist in a certain social system (Mayer-Schönberger, 2008).

The proliferation of ebooks raises concerns about a few companies dominating the market, and discussions of media ownership and control is a topic of concern among political economists (Bettig, 1996; Murdock & Golding, 1979). This has begun to be played out in the legal arena; for example, in 2013 a federal judge ruled that Apple and five big publishers collectively conspired to raise ebook prices (Raymond & Stempel, 2013).

Several commentators, raising similar market power questions about Amazon's leveraging its power over publishers, have criticized the U.S. Department of Justice's suit against Apple and the big five publishers (Hansen, 2012; Hiltzik, 2012; Pearlstein, 2012; Shermer, 2012). In 2010, Amazon accounted for about 80 percent share of the ebook retail market (Hansen, 2012). Simply put, those commentators who criticized the U.S. Department of Justice's suit against Apple and the big five publishers shared concern that the U.S. Department of Justice had picked the wrong "monopoly" in the name of protecting consumers' benefits. The real monopoly issue had something to do with Amazon's market dominance and, accordingly, critics contended that the U.S.

government should have investigated Amazon's behavior as well as implications of the company's behavior on the ebook ecosystem.

Amazon contended that ebook prices of $14.99 or more are "unjustifiably high" and that lower prices can generate greater total revenue, satisfying all parties involved ("Amazon/Hachette business interruption," 2014). In other words, Amazon believes that the price of $9.99 for ebook content generates higher revenue for all parties. Amazon's argument, based on assumptions of consumer interest in lower prices, calls for academic investigation. After all, consumer benefits are not measured solely by price. In fact, lower prices can potentially limit choices available to consumers, market innovations, and quality publications.[56] By critically examining the economic structure and market of ebooks, this chapter recommends a more balanced approach to the four modalities that regulate the ebook ecosystem.

While the general public and the media have directed attention toward the shaping of the ebook market, only limited discussion rises about restrictive licensing agreements demanded by publishers under Terms of Service. Licensing issues relate also to laws, social norms, market structures, and technological architecture. These, in turn, influence individuals' experience with ebook usage. Using Lessing's typology as an analytical framework, this chapter examines how the four modalities have shaped the

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56 Carr (2012) notes, "From the very beginning and with increasingly regularity, Amazon has used its market power to bully and dictate. It leaned on the Independent Publishers Group in recent months for better terms and when those negotiations didn't work out, Amazon simply removed the company's almost 5,000 e-books from its virtual shelves" (para. 8).

current ecosystem of ebooks, and how these modalities affect regulation of the ebook ecosystem.

The Law

Various laws, including copyright laws and antitrust laws, influence the ways in which the ebook ecosystem operates. Laws have effects on market structures, citizens' social norms, and architectural structures relating to the ebook ecosystem and vice versa. Two sets of laws—antitrust law and copyright law—are the focus of this section of the current study. Over the past few years, ebook market players, such as Amazon and Apple, have been involved in high profile antitrust cases that warrant further investigation. Copyright law also influences the ways that individuals consume content on their ebooks.

Antitrust Law

In 1890, Congress passed the Sherman Act, the first antitrust law, as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade" (*Northern Pacific Railway Co. v. United States*, 1958, p. 4).[57] Later in 1914, Congress passed the Federal Trade Commission Act and the Clayton Act. These three federal antitrust laws are still in effect. The ever-deepening conflict between Amazon, which continues to exert its unprecedented market power, and other

[57] The U.S. Supreme Court further noted that antitrust law "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions" (*Northern Pacific Railway Co. v. United States*, 1958, p. 4).

ebook market participants has raised a set of questions regarding application of antitrust laws.

In June 2015, the European Commission announced that it has recently opened an investigation of Amazon regarding the tech giant's allegedly anticompetitive behavior in the region's ebook market (Streitfeld & Scott, 2015). Increasing complaints from European publishers and booksellers with regard to Amazon's monopoly-like position in the region's ebook market presaged the European Commission's investigation. In June 2014, a complaint was filed by the German Publishers and Booksellers Association regarding Amazon's allegedly monopolistic behavior in the ebook market, and later that summer an open letter, signed by hundreds of writers from various countries including Austria, Germany, and Switzerland, was sent to Amazon, claiming that Amazon had manipulated its recommended reading lists and lied to customers regarding the availability of books published by Bonnier, a leading publishing group in Germany, as retaliation by Amazon against Bonnier, that was in a dispute with Amazon (Streitfeld & Scott, 2015).

When Amazon started selling books online, publishers welcomed the new distribution system, assuming that Amazon's system would lead to enormous sales revenue "without siphoning off revenue from the old brick-and-mortar stores" (Marcus, 2013, p. 101). However, publishers soon realized their predictions were wrong because when Amazon secured significant portions of the market, it started pressuring publishers to charge lower prices (Marcus, 2013).

Amazon often sold best sellers at prices lower than other independent booksellers by offering deeper discounts, a practice that continues in the ebook market where new books and best sellers sell for $9.99 (Pike, 2012a). This strategy propelled Amazon to become the dominant ebook vendor and e-reader seller in the ebook market, allowing the company to eventually provide around 90% of all ebooks sold (Pike, 2012a). Amazon's early 90% share created a competitive advantage for the company.

Then, Apple entered the market. Instead of using Amazon's wholesale model of pricing, Apple adopted an "agency" model of pricing. The agency model allows the publishers to set the price and then pay a 30% commission to the retailer. Under the wholesale model, publishers are not allowed to exert power over the ultimate pricing of their books but rather simply receive half of the list price (Carr, 2012). Recent lawsuits challenge the shift from the "wholesale" model to the "agency" model (Cooper, Cushmac, Morse, Farringer, & Istrail, 2012). The basic assumption underlying the recent lawsuits is that Apple and major publishers adopted the agency model in an effort to force Amazon to abandon its below-cost pricing strategy and thereby increase Amazon's ebook prices.

Based on investigations by the U.S. Justice Department's Antitrust Division, the Department of Justice in April 2012 filed a class action lawsuit against Apple Inc. and five publishers, accusing them of colluding to increase and fix the price of ebooks. The Justice Department assumed a routine position in the case: "Stripped of the glitz surrounding e-books and Apple, this is an unremarkable and obvious price-fixing case

appropriate for *per se* condemnation."[58] The antitrust case, filed by the Justice Department, resulted in settlements with the big five publishers, but Apple appealed in 2014 (Streitfeld & Scott, 2015). In June 2015, the Second Court of Appeals reaffirmed the district court's decision that Apple and the big publishers collectively conspired to raise ebook prices in the market.[59] One of the most established rules in antitrust cases is that horizontal price fixing is almost automatically regarded as anti-competitive (Sagers, 2014), and this reasoning was applied to Apple's ebook antitrust case.[60]

However, as Jacobs (1995) points out, it is difficult to resolve normative antitrust questions objectively since any final decision is political in nature. One normative question that warrants attention in the Apple case is whether enforcing vigorous price competition is desirable when market innovation or changes are occurring. In other words, in some circumstances, whether publishers should be allowed to collude in order to counteract the monopolistic power of Amazon (Kirkwood, 2014).

Diverging from the Chicago School's definitions that rely exclusively on economic terms and calculations to detect anticompetitive behaviors, scholars who have taken a critical position argue that the purpose of antitrust laws is "to combat deeply felt social and political problems" (Jacobs, 1995, p. 220). It is important to note that those who are critical of the Chicago School's exclusively economic approach do not exclude

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58 Plaintiff's Pretrial Memorandum of Law, United States v. Apple, Inc., No. 12-cv-2826 at 4 (S.D.N.Y. May 14, 2013).

59 See http://cdn.arstechnica.net/wp-content/uploads/2015/06/13-3748_Documents.pdf

60 In the United States, "certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are '*per se*' violations of the Sherman Act; in other words, no defense or justification is allowed," Available at: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws

economics in antitrust analyses. Rather, they tend to argue that socio-political perspectives can help decision-makers gain a more accurate understanding of the marketplace, in turn, assisting decision-makers to reach a more refined decision in determining anticompetitive conduct (Jacobs, 1995). Following that line of thought, Jacobs (1995) further argued that "decisions about antitrust policy must not hinge on inadequate economic data, but rather on the acceptance or rejection of normative, political assumptions" about the marketplace (p. 219).

Kirkwood (2014) claimed that when several conditions are met, collusion among suppliers can be justified. According to Kirkwood (2014), colluding suppliers (i.e., in this case publishers) should be able to demonstrate that their customer's buying power is monopsony power and that the power was legally obtained and has been substantially persistent. If the buying power fails to reach monopsony power, the suppliers need to further prove their action is desirable by showing the powerful customer's behavior is limiting market innovation. Finally, suppliers' collusion does not have to do with creating downstream market power.

Many commentators have criticized that federal regulators are benefiting Amazon, the emerging monopolist in the ebook market, by leaving free Amazon to fully exert its market power and dominance and by not regulating its detrimental effects on consumers (Carr, 2012; Hiltzik, 2012; Pearlstein, 2012; Turow, 2012).

Their reasoning is that permitting a little anti-competitive behavior may yield pro-competitive results, thereby benefiting consumers by reducing the monopolistic power of Amazon. Hence, one might believe that it is desirable to consider all the

relevant circumstances to reach a refined decision about whether the behavior of Apple and the big five publishers was ultimately pro-competitive behavior or anticompetitive. Considering all the circumstances involves a demanding fact-finding process for the court. By contrast, simply judging the Apple case as a price-fixing case and thus not paying attention to what was actually going on the market is not desirable, given that Amazon was arguably exerting its monopolistic power in the ebook market. In sum, in the Apple case it was desired that the court consider the relevant socio-political perspectives as well as the economic analysis, given that data about the ebook market continues to be incomplete and Amazon adopted below-cost pricing as a way to continue its market dominance. However, by limiting its analysis to an economic one, the U.S. District Court for the Southern District of New York did not consider broader socio-political conditions. Reaffirming the district court's injunction against Apple, the Second U.S. Circuit of Appeals in Manhattan ruled that "Apple orchestrated a horizontal conspiracy among the Publisher Defendants to raise ebook prices is amply supported and well-reasoned, and that the agreement unreasonably restrained trade in violation of § 1 of the Sherman Act" (p. 7).[61] By characterizing the agreement between Apple and the five publishers as a horizontal price-fixing effort, the court easily relied on the *Per Se* rule that virtually automatically condemns any horizontal price-fixing agreements as illegal.

It is important to note that several commentators have argued that price competition may potentially bring harmful effects to society as a whole by discouraging the creation of literary works. Scott Turow, President of the Authors Guild, argued that

61 See http://online.wsj.com/public/resources/documents/2015_0630_apple_2nd.pdf

"Amazon was using e-book discounting to destroy bookselling, making it uneconomic for physical bookstores to keep their doors open" (Turow, 2012). Given the changes currently underway in the market, arguments both for and against enforcement of vigorous price competition lack empirical evidence. As of now, one thing is clear: Amazon's price-cutting strategy can potentially eliminate its competitors in the ebook market. This possibility may be further accelerated if Amazon tries to lock in Kindle users to its e-book ecosystem by making it difficult for Kindle users to purchase ebooks elsewhere. That possibility should be closely watched as it is relates to the discussion of architecture, one of four modalities that regulate the ebook ecosystem.

In addition to antitrust law, copyright law is also pertinent. It governs the scope of behaviors that consumers can employ with their ebooks. Specifically, with regard to printed books, the first sale doctrine of copyright law allows the owner of a copy of a copyrighted work to exercise her property right over that particular copy. By limiting the copyright holder's distribution rights, the copy owner can exercise her property right (e.g., to sell, lend, or give her property away) notwithstanding the fact that the copyright holder's creative expression is embedded in the tangible object. By contrast, with regard to ebooks, the first sale doctrine does not apply so that people cannot resell, rent, or lease the ebook content. Below I explain this relationship in connection with the licensing regime.

Copyright Law: Ebooks Are Not Sold But Licensed

How people obtain and use ebooks is largely determined and conditioned by the restrictive licensing schemes that publishers impose on consumers. To understand the ways people interact with ebooks, it is essential to examine the current licensing scheme. The first sale doctrine applies *only* to a lawful "owner" of a copyrighted copy. Therefore, if an individual does not have an ownership interest in a particular copy, then the individual cannot resell or transfer that copy without the copyright holder's permission. It is increasingly common that copyright holders do not transfer the ownership of their content but license them in order to control a broad range of consumer activities. Moreover, copyright holders often use a boilerplate agreement that does not allow consumers to negotiate with regard to specific terms and conditions. What matters in real world situations is that consumers usually do not read the boilerplate agreement closely or they do not even know agreement exists. In addition, the actual language used in transaction processing often offers "misleading or incomplete information about [consumers'] rights and options" (Stein, 2013, pp. 359-360).[62] The rights of lawful purchasers of digital content are unreasonably disadvantaged by contractual clauses that impose restrictive licensing agreements, in particular with regard to resale. As a result, through licensing agreements, copyright holders can make changes to consumers' digital content without the consumers' permission or they can even delete content at any time, if the need arises from the copyright holder's perspective. These limitations can work to the disadvantage of consumers' rights.

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62 It is worth noting that consumer rights groups may need to put pressure on content industries to use more transparent language on the face of the transaction. Or, there may be a need to adopt an "ebook consumer bill of rights" to prevent copyright holders from deleting purchased content.

Amazon's Kindle Terms of Use reads:

> We may change, suspend, or discontinue the Service, in whole or in part, at any time without notice. We may amend any of this Agreement's terms at our sole discretion by posting the revised terms on the Amazon.com website. Your continued use of a Kindle, the Software or the Service after the effective date of the revised Agreement terms constitutes your acceptance of the terms.[63] (Kindle Terms of Use, 2014)

Libraries' Struggles with Ebook Lending

Some publishers are concerned about their revenues being reduced due to the longevity of ebooks and this concern has caused them to limit the licensing of their ebook content to libraries (Manley & Holley, 2012). Ebook licensing arrangements can be grouped into several categories. Rice (2006) proposes three basic models of ebook licensing agreements, recognizing several variations and one notable exception.

The first model of ebook licensing, referred to as the print model, treats ebook licensing the same way that libraries treat a printed book. Once a book is checked out to one user, another user cannot access it. The second model is the so-called "database subscription" model that is based on an annual subscription fee with unlimited, multiple simultaneous access. Database subscription models are one of the most frequently employed licensing arrangements. A good example of this model is ebrary (www.ebrary.com) that helps libraries' effectively order and administer ebook

63 See http://www.amazon.com/gp/help/customer/display.html?nodeId=200506200

collections, although the vendor also provides other options, including the database model.[64] Ebook vendors, such as Gale Virtual Reference Library (GVRL) and OverDrive, offer a few different types of access, including vendor managed access (e.g., Follett, Baker and Taylor, OverDrive), aggregator managed access (e.g., EBSCO, Mackin), publisher managed access (e.g., Facts On File, Chelsea House, Rosen, Britannica), and acquisition of titles via bundlers (e.g., GVRL, EBSCOhost, ProQuest ebrary and Questia) (American Association of School Librarians, 2013). Finally, there is a free and open access model that allows anyone to access ebook collections online. Digital Rights Management (DRM) technology is not applied to open access ebooks. Under the free and open access model, many books are freely available online with varying degrees of restrictions on use. For example, the Project Gutenberg (http://www.gutenberg.org) provides users with more than 49,000 free ebooks. Most of the collections belong to the public domain because their copyright has expired. The National Academies Press (NAP), created by the National Academy of Sciences, offers more than 4,000 books in PDF format for free and, in addition to selling numerous books covering a wide range of topics. In terms of restrictions, the freely available books on the National Academies Press website are copyrighted by the National Academy of Sciences with all rights reserved.

Regardless of which licensing model libraries use when purchasing an ebook, no libraries actually *own* ebooks (Vaccaro, 2014). Instead, the libraries merely purchase a license that allows them to offer access to ebooks in their collections. The distinction

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64 In 2011, ebrary was acquired by ProQuest.

between owning a book and purchasing a license is important because publishers can impose various restrictions on content that is licensed to libraries. Given that libraries have sought to enhance their service capabilities by providing more ebooks, it is possible they may face difficult situations in the future since publishers often put restrictions on which ebooks libraries can offer and on how those ebooks can be made available to patrons (Vaccaro, 2014). For example, some publishers, such as HarperCollins, limit the number of times their ebooks can be loaned, thereby forcing libraries to repurchase a content license to continue serving its patrons with the same content (Greenfield, 2014). This is a huge contrast with the traditional mode of library operations, in which a printed book is owned in perpetuity and loaned on terms the library itself determines.

The current licensing scheme with regard to ebooks is even more problematic because it poses profound questions about the future lending activities of libraries. Given that libraries have historically played an important role in furthering democracy by providing the public with exposure to diverse expressions of cultural works and information, an investigation is warranted into the ways that the current licensing regime restricts the ability of libraries to fulfill their missions.

As Palfrey (2015) argues, "Libraries…function as essential equalizing institutions in our society. For as long as library exist in most communities, staffed with trained librarians, it remains true that individuals' access to our shared culture is not dictated by however much money they have" (p. 9). For libraries that cannot afford the costs of renewing licenses for ebooks, the licensing regime is imposing a heavy burden. Due to publishers' pricing strategies, libraries often have to pay significantly more for

ebooks than consumers pay (Vaccaro, 2014).[65] More significantly, copyright holders can always delete ebooks from public libraries' virtual shelves based on licensing agreements. By contrast, publishers cannot put such restrictions on libraries with regard to physical books, due to the first-sale doctrine that allows lawful purchasers to resell or lend purchased books.

It is worth noting that "until very recently [publishers have] been mostly unwilling to sell e-books to libraries to lend, fearful that doing so would hurt their business" (Marx, 2013, para. 2). Publishers are able to dictate any restrictive licensing terms including a refusal to offer ebooks to libraries. In addition, libraries that cannot purchase or renew a license for the content in question are likely to struggle to fulfill their mission to the public in a democratic society. Neither is it easy to share ebooks among libraries. As of now, statewide ebook inter-library lending is limited due to restrictions imposed by publishers.

Yet, ebooks are becoming an increasingly popular format for individuals to access cultural works that support democracy. As Mark (2013) notes, "as the nature of reading changes, access to [ebooks] is essential for libraries to remain vital" (para. 8). Especially for individuals who cannot afford to buy ebooks or subscribe to broadband Internet access at home, libraries remain the primary source of content to improve literacy and support meaningful civic engagement. In that regard, the current licensing

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65 Consider this incident. In February 29, 2012, Debra Oberhausen, manager of collection services at the Louisville (Ky.) Free Public Library, paid $40 to purchase an ebook entitled *Eisenhower in War and Peace.* Publishers raise prices for ebooks too easily. On March 1, the price for the same ebook was $120. At that time, if the library's discount rate is applied, the print version of the book could be purchased at approximately $20. And the book's retail price was $40 (American Library Association, 2012). Available at http://www.ala.org/news/mediapresscenter/americaslibraries/soal2012/new-focus-on-ebooks

regime limits the ability of libraries to serve the public, thereby posing deeply profound concerns for a well-informed democratic society.

The Market

Ownership Concentration and Amazon Power

People's access to and use of ebooks is influenced by market forces. Market forces, such as Amazon's monopsony power, regulate business practices and condition the potential for business success in the ebook market. That impact is evidenced by an increasingly large volume of printed books being displaced by ebooks (Wollman, 2011). Stakeholders in the ebook market include publishers, authors, retailers, distributors, libraries, and users. In examining the ebook market through the lens of political economy, particular attention needs to be directed toward emerging structures and shifting power relationships.

Online retailers such as Google, Apple, and Amazon are becoming increasingly involved in shaping the ever-evolving ebook market. In a battle with Hachette, a major publisher, Amazon removed pre-orders of Hachette books, delayed the shipping of Hachette books without reasonable cause, and reduced discounts on Hachette's titles in the U.S. (Garside, 2014). The recent conflict between the Hachette publishing group and Amazon demonstrates that Amazon is capable of exerting market dominance over publishers in the ebook market, potentially limiting the diversity of cultural expression as well as dissemination of information in society. As a counter to Amazon, the big five publishers have considered collective countermeasures. As discussed earlier in this

chapter, the question of whether the collusion among publishers can be justified as a countermeasure to Amazon's monopolistic practices is difficult to ascertain. The ongoing debate concerning ownership concentration in the publishing industry and its implications for society is currently moving into another phase with the meteoric rise of new key players, such as Amazon.

Similar to other industries, for example, the film entertainment industry, the publishing industry has long been described as oligopolistic. The big six publishers (now big five) publishers, owned by media conglomerates such as News Corporations and CBS Corporation, have accounted for the bulk of the industry's revenue and market share while countless small publishers have struggled at the periphery. According to Hannaford (2007), those major publishers accounted for more than 80 percent of book sales at some point in the past. The five largest publishers in the U.S. account for more than 60 percent of the revenue generated by the publishing industry (DeMasi, 2014). Ownership concentration in the publishing industry is strengthening. In July 2013, there was a historical merger between Penguin Group and Random House so that the Big Six became the Big Five and another merger may be on the horizon. HarperCollins considered a merger with Simon & Schuster (Greenfield, 2014), although the merger has not yet happened as of this writing. Both HarperCollins and Hachette acquired Thomas Nelson and the adult list of Hyperion, respectively (Greenfield, 2013). The decades-long concentration of ownership in the publishing industry has not come without cost. Dozens of formerly independent publishers have been bought out by a conglomerate that includes Farrar, Straus & Giroux, a publisher that had previously provided readers with books of

numerous Nobel Prize winners, Pulitzer Prize winners, and famous writers such as T. S. Eliot and Flannery O'Connor (Kachka, 2013).

Table 1 illustrates corporate linkages within the publishing industry. It is important to note that most of these major publishers are owned by media conglomerates, and media conglomerates exert influence over multiple sectors at the same time (Murdock & Golding, 1979). This has been an ongoing trend over the past several decades. Thus, debate over the impact of ownership concentration in the publishing industry also encompasses discussion of media ownership and control.

Table 1. Big Five Publishers in the United States

Publisher	Mother Company	Publishing Divisions (Imprints)
Hachette Book Group	Lagardère SCA (French media group)	Grand Central Publishing; Little, Brown and Company; Little, Brown Company Books for Young Readers; Faith Words; Center Street; Orbit; Yen Press; Hachette Audio; and Hachette Digital
HarperCollins Publishers LLC	News Corporation	HarperCollins; William Morrow; Avon Books; Broadside Books; Harper Business; HarperCollinsChildrens; HarperTeen; Ecco Books; It Books; Newmarket Press; Harper One; Harper Voyager US; Harper Perennial; HarperAcademic and Harper Audio
Macmillan Publishers	Verlagsgruppe Georg von Holtzbrinck (German based publishing holding company)	Farrar, Straus and Giroux; Henry Holt and Company; Picador; St. Martin's Press; Tor/Forge; Macmillan Audio; and Macmillan Children's Publishing Group
Penguin Random House	Pearson and Bertelsmann (Pearson is a publishing and education company and Bertelsmann is German based media conglomerate)	Some of its imprints include: Random House Publishing Group, Knopf Doubleday Publishing Group; Crown Publishing Group; Penguin Group U.S.; Dorling Kindersley; Mass Market Paperbacks, Penguin Group U.S.; Random House Children's Books; Penguin Young Readers Group, U.S.
Simon & Schuster	CBS Corporation	Atria, Folger Shakespeare Library, Free Press, Gallery Books, Howard Books, Pocket Books, Scribner, Simon & Schuster, Threshold Editions and Touchstone

Note. Not all imprints were included in this table. For instance, Penguin Random House has more than 250 imprints. Adapted from Kelley (2012). *A guide to publishers in the library ebook market*. Retrieved from http://www.thedigitalshift.com & Peterson (n.d.). *The big five trade book publishers*. Retrieved from http://publishing.about.com

Similarly, the ebook market is also oligopolistic. In 2013, Amazon held 60 percent of the ebook market, followed by Barnes & Noble (27%) and Apple (less than 10%) (*Book House of Stuyvesant Plaza et al v. Amazon.com et al*, 2013). In 2013, the Book House of Stuyvesant Plaza and two other independent "brick-and-mortar" booksellers filed a lawsuit against Amazon and the nation's six largest book publishers (i.e., Random House, Penguin Group, Hachette Book Group, Simon & Schuster, HarperCollins, and Holtzbrinck), arguing that Amazon and the other major publishers have created a monopoly over the way ebooks are sold (Albanese, 2013). The plaintiffs claimed that Amazon's use of proprietary digital rights management (DRM) in its own ebook reader platform, which again comprises the majority of the ebook device market, is shutting out a portion of the ebook market for independent booksellers by eliminating their opportunities to sell content for use on Kindle (*Book House of Stuyvesant Plaza et al v. Amazon.com et al.*, 2013). In this case, federal Judge Jed Rakoff dismissed the class action lawsuit sought by three independent booksellers on the grounds that the plaintiffs did not provide supporting evidence regarding the alleged conspiracy between the then big six publishers and Amazon as well as a lack of plausible motives for the conspiracy (Albanese, 2013). Judge Rakoff ruled:

> …nothing about [the] fact [that the publishers agreed with Amazon with regard to requiring DRM] suggests that the publishers also required Amazon to use device-restrictive DRM limiting the devices on which the Publishers' e-books can be displayed, or to place restrictions on Kindle devices and apps such that they could only display e-books enabled with Amazon's proprietary DRM. Indeed,

> unlike DRM requirements, which clearly serve the Publishers' economic interests by preventing copyright violations, these latter types of restrictions run counter to the Publishers' interests, as they restrict the ability of paying customers to obtain the Publishers' e-books from Amazon or on Kindle devices or apps. (*Book House of Stuyvesant Plaza et al v. Amazon.com et al.*, 2013, pp. 8-9, emphasis in original)

What was not substantially discussed in the suit was the question of how Amazon controls the ebook market and, as a result, how Amazon may be responsible for harm to consumers. All in all, the publishers failed to meet legal criteria related to antitrust law. Amazon has been competing with independent "brick-and-mortar" booksellers. Unlike in Europe where there exist more vigilant anti-trust regulation and enforcement, American corporations are allowed to leverage market dominance unless they are considered to be exploiting their dominance in explicitly anticompetitive ways (Streitfeld & Scott, 2015).

Although the U.S. and the European Union have laws in common that protect competition in their jurisdictions, when it comes to defining "what constitutes a dominant firm and the types of conduct that constitute violations of law" major differences exist between the United States and the European Union (Fox, 1997, p. 343). As Fox (1997) notes, "market power (even monopoly power) alone is not enough to violate American statutes; there must be an element of unacceptable conduct to achieve or maintain that position" (p. 343). On the contrary, the European Commission's Article 82 reads: "Any abuse by one or more undertakings of a dominant position within the common market or

in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States" and further spells out examples of dominant-firm abuse.[66] Arguably, Amazon is competing with both independent "brick-and-mortar" booksellers and publishers, enjoying the U.S. competition law's approach to anticompetitive behavior. However, as noted, Amazon's monopoly-like behaviors are relatively open to antitrust investigation in other jurisdictions.

Meanwhile, as Amazon's sales have increased, Barnes & Noble's Nook ebook reader business and its digital content sales business have continued to lose money, and on July 2 2015, Barnes & Noble announced it had hired a new CEO to revive its faltering Nook business (Wahba, 2015). In March 2014, Sony closed its Sony Reader Store in the United States and Canada, advising customers to transfer their accounts to Kobo, an eReading service that serves millions of customers worldwide ("Reader store closure," 2014). Amazon's success in the ebook market is attributed to its ability to understand and satisfy customer needs and demands, especially based on Amazon customers' previous purchases.

There is little doubt that more books are published now than ever before. However, it remains to be seen whether the dissemination of culturally diverse content is able to flourish as ownership in the publishing industry becomes more densely concentrated, producing potentially harmful effects for both writers and consumers (Kachka, 2013).[67] Under oligopoly, it is difficult for writers to negotiate with publishers

66 See http://ec.europa.eu/competition/legislation/treaties/ec/art82_en.html

67 It should be noted that measuring content diversity is extremely difficult.

because alternative negotiation partners are usually limited. Indeed, fewer imprints bidding for a writer means less competition among publishers. Writers are restricted to lower advances and fewer options to publish books. Furthermore, as Anders (2012) notes, "if imprints do merge or come under a single editorial management, that means eventually you have somewhat fewer approaches…at least, within mainstream publishing" (para. 6). Fewer publishers can lead to less variety in "the 'semiotic' realm of meaning-making" (Bracha & Syed, 2014, p. 255). This trend, in turn, could negatively impact a "democratic culture" where "individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals" (Balkin, 2004, p. 3).

The Architecture

The Interoperability of Ebook Formats

In taking stock of the ebook ecosystem, one must consider the sales platform, ebook devices (i.e., eReaders), ebook formats, distribution channels, production tools, contractual agreements, and so forth. Particularly important among those elements is the platform. Unless a user is technically adept, transferring or exporting ebooks from one reader to another is virtually impossible. Amazon's Kindle makes it difficult for users to read ebooks other than Kindle's applications. The same is true for Apple's iBooks. Thus, ebook consumers are stuck with a series of closed ecosystems produced by major ebook players. It is important to note that these closed ecosystems for ebooks exert a negative influence on expressive diversity by limiting consumers' free choice to purchase ebooks

across a wide spectrum of topics and authors unless they invest in an array of platforms and devices.

Proprietary Digital Rights Management (DRM)

What prevents the free exchange of ebooks between different ecosystems are primarily the barriers created by proprietary DRM systems. There is a growing global consensus that one should be able to read his or her ebook regardless of time, place, and device (Bläsi & Rothlauf, 2013). The European Commission considers "interoperability" one of the key goals to be sought in the digital age (European Commission, 2013). Establishing effective interoperability between devices and applications including ebooks, is essential to protecting consumers' rights to read and communicate with others. However, through license agreements such as the "click-wrap" license that requires consumers to agree to license terms and conditions before using the product by clicking an "I Accept" button, copyright owners can easily adopt DRM-enforced licenses to better protect their copyrighted works and to maximize profits from distribution of those works in the process eliminating interoperability.

Downstream Alteration in the Digital Age

Another issue that digital technologies have brought up in connection with how the ebook ecosystem is taking shape is what is referred to as downstream alteration. In July 2009, Amazon remotely deleted George Orwell's "1984" and "Animal Farm" from users' Kindles after discovering those ebooks had been added to Amazon's Kindle store

by a company that did not first obtain permission from the copyright owner. A lawsuit against Amazon was filed by two high school students who found their annotations were gone along with their ebooks. In October 2009, Amazon agreed to pay $150,000 and admitted that it had acted wrongly (Kellogg, 2009). Jeff Bezos, CEO of Amazon, posted the following "apology" to the Kindle forum:

> This is an apology for the way we previously handled illegally sold copies of 1984 and other novels on Kindle. Our 'solution' to the problem was stupid, thoughtless, and painfully out of line with our principles. It is wholly self-inflicted, and we deserve the criticism we've received. We will use the scar tissue from this painful mistake to help make better decisions going forward, ones that match our mission. ("An apology from Amazon," 2009)

Amazon also is alleged to have closed several Kindle users' accounts without providing detailed information (Doctorow, 2012). One Kindle user living in Norway, where Amazon does not operate, found her account deleted without a detailed explanation but, instead, with the following email message from Amazon:

> We have found your account is directly related to another which has been previously closed for abuse of our policies. As such, your Amazon.co.uk account has been closed and any open orders have been cancelled. Per our Conditions of Use which state in part: Amazon.co.uk and its affiliates reserve the right to refuse service, terminate accounts, remove or edit content, or cancel orders at their sole discretion. (King, 2012, para. 5)

As Bekkelund (2012) notes, the Amazon incident demonstrates that if "the retailer, in this case Amazon, thinks you're a crook, they will throw you out and take away everything that you bought" (para. 9). Putting aside the question of whether Amazon should be entitled to have the authority to delete something that users "own" without the user's permission, in practice, Amazon can delete all of a user's content remotely under the licensing terms the user was forced to agree with in order to use Amazon's services. According to the Kindle Store Terms of Use, "Kindle Content is licensed, not sold, to you by the Content Provider." Put in the legitimacy of "browsewrap" terms, Amazon can reach into its users' Kindles and delete all files, an act not deemed illegal in the age of licensing.

Another example of downstream alteration in the realm of ebook use poses a profound question about changing history. One publisher decided to remove "the n-word" from new editions of *The Adventures of Huckleberry Finn* and Kindle users found that in their ebooks n-words were replaced with other words (Chan, 2013). Setting aside the question of whether the n-word should be banned, changing literary works that hold historical value is a hazardous endeavor. Chan (2013) argues that "this category of revisions is the most problematic because it both threatens the preservation of cultural history and amounts to private censorship" (p. 272). People often say that preserving historical places and knowing history is important to avoid repeating past mistakes (Karpyn, 2015). Of similar importance is the preservation of literary works, such as *The*

Adventures of Huckleberry Finn and *Gone with the Wind,* in their original form to also help society avoid repeating mistakes of the past.

Still another example illustrates that owners can alter material on their licensed devices even if that material was not purchased from them. In 2010, Sony remotely updated its users' PlayStation 3 to delete other operating systems that users were allowed to install on users' original models of PlayStation 3 (Chan, 2013). If a user refused to update the system, the user's access to PlayStation Network was denied and the user was unable to run new video games and Blu-Ray movies on his or her PlayStation 3.

Downstream alteration is not some abstract concern but an issue that continues to take concrete shape in the age of licensing. Under the current legal system, copyright owners are allowed to use licenses, but whether copyright owners' rights are asserted in an appropriate manner warrants critical investigation as increasingly more digital content is being licensed, rather than sold to users. Possible abuse of downstream alteration capabilities reflects on the new parameters of copy ownership. Historically, in the U.S., copy ownership has been regarded to include: "(1) the ability to read, play, use, or otherwise access a copy, and (2) the ability to lend, rent, sell, or otherwise transfer a copy" (Liu, 2001, p. 1286). Even in the age of licensing agreements, copy owners' rights need to be preserved and property rights over their purchased digital copies need to be protected.

Social Norms

Copy Ownership and Materiality

People's expectations and behaviors regarding the use of their digital artifacts reflect their experience with physical artifacts. For example, when people purchase ebooks, they tend to believe they own their ebooks in the same way they own their paper books. In other words, an individual's perception of copy ownership is likely to be the same regardless of the format (i.e., paper book v. ebook). Additionally, copyright owners commonly use boilerplate agreements to which buyers pay little or no attention and oftentimes do not even know the existence of due to presentation tactics, such as click-wrap licenses and the use of language that is nontransparent, misleading, and incomplete. Therefore, upon discovering they do not actually own their purchased ebooks and cannot transfer those ebooks, consumers often feel deprived of their legitimate rights.

Although many people acknowledge that digital goods are different from physical goods, such as paper books, when it comes to their rights as copy owners, they may see no difference. Lessig references this phenomenon as the effect of social norms. People and institutions have cultivated expectations regarding their practices and conventions accruing to owning books and working with them. To the extent that copy owners have moved toward schemes such as licensing that undercut those expectations, a certain amount of outrage and discomfort can be expected.

A growing body of scholarship contends that it is important to understand the interaction between people and technologies in terms of better predicting and planning for changes (Epstein, 2008; Leonardi & Barley, 2008; Leonardi, 2010). Additionally, Leonardi and Barley (2008) observe:

> Understanding how people deal with an information technology's materiality seems essential for developing a broader and fuller understanding of organizing. By bringing materiality more centrally into theories of change we should be able to speak more precisely about why people do the things they do with technology and why organizations and practices acquire the forms they acquire. (p. 172)

When society is conceptualized as consisting of people and organizing forces that include rules and regulations, a clearer understanding of how people interact with technologies will likely influence the adjudication of contemporary societal problems, including copyright issues. However, U.S. courts and legal scholarship have paid little attention to understanding how people actually interact with technological artifacts in their daily lives.[68] That slippage may be particularly irresponsible with respect to ebooks, given their cultural status on many societies.

Before the introduction of digital technologies, it was generally taken for granted that properties are tangible and touchable, like paper books, buildings, and paintings. However, with the introduction of digital technologies, questions have been posed as to whether digital artifacts, such as software, have "materiality" because people tend to associate materiality with physical matter—tangible stuff (Leonardi, 2010). Given the

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68 One notable exception can be found in the U.S. Supreme Court's 1984 landmark ruling in the case of *Sony Corp. of American v. Universal City Studios, Inc*. How people actually used technologies figured prominently in the *Betamax* case. Recognizing that millions of VTRs were in use in America and the VTRs can be used for both infringing and substantial non-infringing uses, the Court ruled: "If there are millions of owners of VTR's who makes copies of televised sports events, religious broadcasts, and educational programs such as *Mister Rogers' Neighborhood*, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copyright feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works" (*Sony Corp. of America* v *Universal City Studios, Inc*., 1984, p. 446).

conceptual ambiguity with regard to materiality, copyright law's distinction "between the immaterial 'work' and its fixation in a physical 'copy'" has been increasingly challenged (Burk, 2013, p. 1).

Scholars across disciplines, including sociology, science and technology studies, communication, and management among others, have sought to characterize materiality and in the process have experienced difficulty coming up with a working definition (Leonardi, 2010). Yet, a growing number of scholars question the conventional narrow understanding of "materiality" (Leonardi, 2010, Sterne, 2014).

Building on multiple meanings of the adjective "material" as defined in the *Oxford English Dictionary*, Leonardi (2010) argued that the concept of materiality can hold different meanings, given that the adjective "material" has other meanings, such as "practical instantiation" and "significance" as well as having physical substance. According to Leonardi (2010), immaterial things such as abstract ideas, beliefs or values can become material if they instantiate theoretical constructs in one way or another. If we adopt this definition of material, then software has materiality. Sterne (2014) defined materiality as "both physical things and the irreducibly relational character of reality" (p. 121). In another study, Sterne (2012) argued that "Software and data have their own materialities, even if their scale seems inhuman…hard drives are designed to hide their process of magnetic inscription from users' sight, and the result is that invisibility has been conflated with immateriality" (Sterne, 2012, pp. 6-7).

Following that line of thinking, this dissertation argues that the notion of materiality should not be limited to the tangible feature of an object, given the importance

of interaction and expectations between people and material objects that shapes the legal terrain surrounding copyright. As I demonstrate in Chapter 6, the conventional understanding of a material object led the one court (in the *ReDigi* case) to differentiate digital music files from CDs, although both MP3 files and CDs consist of a series of ones and zeros. Here, the concept of materiality becomes relevant. Regardless of whether a copyright owner's original creative expression is embodied in a CD or in digital form, both the CD and MP3 file translate what the creator generates into a form of creative expression. Moreover, the users of those files expect them to behave similarly (to sound alike).

What do the debates about materiality have to do with ebooks? The creative expression of a creator is not protected under copyright law until it is fixed or embodied within an object so that people can recognize it. What copyright protects does not differ in terms of whether the creative expression is embodied in a tangible object or in digital form. If a first sale doctrine is applied to CDs and DVDs, there is no compelling reason to deny applying the doctrine to other digital artifacts such as ebooks. This argument is reasonable in light of an expanded notion of materiality in the context of copyright.

Ebook Piracy

Individuals use ebooks in three ways. They can purchase an ebook online, for example, through Amazon's Kindle store or Apple's iBooks. They can visit online or offline libraries to access ebooks. Or they can use un-authorized methods to download ebooks.

According to Lessig (2006), a social norm governs "how we are to behave" (p. 341). When it comes to the social norms of people's ebook experiences, ebook piracy is of concern. People expect to share and lend books, and they also expect relatively easy access. They also expect that actually own a book when they "purchase" it.

Like music files, ebooks are easily pirated due to their relatively small file size (Hoorebeek, 2003). Various interest groups, particularly copyright holders, have reacted to this threat through legal remedies such as "strike" systems, which have been implemented in some countries to track down illegal file-sharers and warn them that those activities are unacceptable, and through technological protection measures.

Recently, HarperCollins in collaboration with LibreDigital, a provider of distribution and warehousing services for ebook publishers, adopted a new watermarking system from the anti-piracy company Digimarc to embed digital information into their ebooks. HarperCollins takes two different approaches to pre-and post-consumer piracy. The watermark solution is adopted to address any leaks occurring within its supply chain rather than targeting the end consumer. Other anti-piracy solutions such as DRM and the takedown procedures of the Digital Millennium Copyright Act are employed to address individual users' behaviors or pirate sites that warehouse digital copies of books.

Preventing users' unauthorized access to copyrighted works through DRM technologies has become a widely adopted practice in many content industries, particularly after the DMCA was enacted. This approach assumes that all users can potentially engage in illegal downloading. However, another school of thought maintains that people are not likely to engage in illegal downloading if they can pay with ease and

prices are reasonable (Pogue, 2013). Some even argue that DRM-free strategy can eventually increase content creators' revenue because consumers who are exposed to quality content will happily pay for new content or introduce what they've experienced to their friends and family (Pogue, 2013; Burkart & McCourt, 2006).

In April 2012, Tor Books UK made its ebooks DRM-free (Crisp, 2013). One year later the company made an announcement regarding the results of its new experiment:

> DRM-protected titles are still subject to piracy, and we believe a great majority of readers are just as against piracy as publishers are, understanding that piracy impacts an author's ability to earn an income from their creative work. As it is, we've seen no discernible increase in piracy on any of our titles, despite them being DRM-free for nearly a year. (Crisp, 2013, para. 6)

Changing Habits of Consumption

Following trends in other culture industries, a few ebook subscription businesses such as Safari have been launched. In 2014, Amazon launched its own ebook subscription service, Kindle Unlimited, which is available only in the U.S. Similar ebook subscription services such as Oyster and Scribd are currently available in the market. With a monthly fee, those services provide consumers with "unlimited access" to titles available through their service but do not allow consumers to own those titles. Once consumers cancel their subscriptions, they can no longer access ebooks from those providers.

Although those services are not the same as Netflix or Spotify, the transition to subscription-based services is a trend that continues to grow. Following similar trends in music and television programs that circumscribe ways that people consume digital content, Amazon has reached out to more users by initiating its own subscription service. As a result, more users are consuming content via streaming or subscription services as opposed to downloading. According to Amazon, users of Kindle Unlimited can access over 800,000 ebooks and thousands of audiobooks for the price of $9.99 a month.[69] The major issue accompanying these services remains the latitude available for people to exercise ownership-like rights. A second issue concerns how subscription services channel taste and selections according to market potential.

Despite its popularity, the subscription model is not likely to provide enough "common spaces and public forums for sharing tastes and experiences" (Burkart & McCourt, 2006, p. 134). It is difficult to think about unexpected exposure to new books that do not easily fall into one's typical book purchasing categories. How can this narrowed targeting facilitate and promote "the progress of science and useful arts?" Barber and Fox (1958) note that "by its very nature, scientific research is a voyage into the unknown by routes that are in some measure unpredictable and unplannable. Chance or luck is therefore as inevitable in scientific research as are logic and what Pasteur called 'the prepared mind'" (p. 129). Turow (2012) points out that when individuals enter physical bookstores, they are more likely to be exposed to new genres or new authors

[69] See http://www.amazon.com/b?node=9578129011

than when they shop online. This concern captures well the ways that social norms for purchasing books can be influenced by architectures that shape consumer behavior.

DISCUSSION AND CONCLUSIONS

This chapter explores ebooks as a way to chronicle contemporary content creation industry mores and goals. The book, an iconic information product strongly identified with exercising informed democratic rights, morphs into a commodity embedded in a digital ecosystem when it becomes an ebook. To examine the ebook ecosystem, this study has utilized Lessig's four modalities of regulation. The results show that each modality works both independently and in collaboration with other modalities. As Lessig (1999) notes, "To understand how a regulation might succeed, we must view these four modalities as acting on the same field, and understand how they interact" (p. 510).

The current ebook ecosystem limits users' rights on many fronts. Amazon and other major players in the ebook market have built their own closed ecosystems by making it difficult for consumers to freely exchange ebooks across different ebook platforms and to participate in secondary markets. In addition, based on licensing terms, architectural structures allow Amazon and other ebook players to remotely delete a consumer's ebooks or make changes to users' ebooks. The U.S. legal system is built on the premise that "freedom of contract is a core value" (Radin, 2013, p. 56). Thus, ebook distributors, such as Amazon, use boilerplate agreements that can potentially eliminate or limit users' rights through so-called "click-wrap" license agreements. Addressing the

debate surrounding the click-wrap agreement is not the purpose of this study, which would require a separate study. It is sufficient to mention that, as Radin (2013) aptly pointed out, "a boilerplate rights deletion scheme may involve significant unknown losses of your entitlements" (p. 85), and those include rights normally accorded by the first sale doctrine.

In the digital age, consumers do not "own" their ebooks; rather, they are merely licensed to use their purchased ebooks. The first sale doctrine does not currently apply to ebooks. Consumers are not allowed to resell or lend their ebooks without the copyright holder's permission because the current copyright law does not recognize a digital first sale doctrine. In the future, whether consumers can resell, lend, or rent their digital works is likely to have a clear impact on the market of digital works. Social norms regarding the unauthorized sharing of digital works, including digital content and architectural design, are likely to affect attitudes of the content industries toward proprietary DRM and subsequent legal arrangements.

Based on the "Celestial Jukebox" model that allows consumers to enjoy digital cultural works of their choice without transferring ownership of content, the culture industry continues to transform users of copyrighted works from the category of owners to the category of tenants by locking users into the company's own service system (Burkart & McCourt, 2006). In the ebook market, users are increasingly forced to follow restrictive licensing agreements. Indeed, users are treated as renters not owners of ebooks and, in the process, users of ebooks are losing rights previously given to copy owners of printed books. As shown in Chapter 5, this trend runs against maximizing individuals'

self-authorship regarding how to interact with their "purchased" cultural works; also, the current licensing regime imposes an undue burden on libraries in terms of limiting their ability to fulfill their mission to serve the public and further democratic values and destroys more affordable secondary markets.

It is important to note that copyright law is related to the four modalities regulating the ebook ecosystem. Throughout history, copyright law has steadily carved out space where competing normative perspectives and conflicting interests compete with one another. Over the past few decades, copyright protection has increased at an unprecedented rate, serving copyright holders' interests rather than also serving the public's interests in a balanced way. Recent trends that support greater protection of copyright are catalyzed by influential lobbyists, such as the content industry. However, those stakeholders face new countervailing forces advanced by "the periphery" that involves parties who are in support of digital piracy, creative commons, and open source movements. Especially pertinent to the ebook context, lawmakers in the State of Connecticut passed a bill that enables the state library's Board of Trustees to generate a statewide ebook collection that allows anyone with a Connecticut library card to access that collection.

Issues related to the ebook industry should be further explored through normative copyright theories. Historically, the dominant justification of copyright protection has been the economic incentive argument. However, an increasing number of studies suggest that other normative perspectives on the protection of copyright can better address the original intention of copyright legislation. Cultural products, such as books,

have an acknowledged role in facilitating core values of democracy and enhancing the diversity of cultural expression as well as widespread distribution of information. That role justifies public intervention beyond market-based solutions (De Prato & Simon, 2014).

When someone purchases a printed book, the individual continues to own the book and no one takes it away, even if the publisher or bookseller closes its business. That is not the case with ebooks because consumers have the right to access the content but do not actually "own" ebooks.

The first sale doctrine allows a copy owner to exercise his or her property right over that copy. The underlying rationale of the doctrine that protects the rights of a property owner needs to be asserted regardless of the type of format that embodies the creative expression of the copyright owner.

Whether the current copyright regime can be "fixed" so that it supports advancements in science and art, rather than serving merely the interests of copyright holders, depends on action being taken to extend the doctrine of first sale to copy owners of digital content. One thing is clear: The time has come to find a way to balance competing interests of copyright owners and users of copyrighted material in a digital format.

Chapter 5: Cultural Democracy and Copyright

Throughout this dissertation, I argue that cultural democracy can provide an alternative framework for a broader and fuller understanding of the goals of copyright law. By bringing the normative concept into the debate surrounding the establishment of a digital first sale doctrine, this dissertation explores ways the concept is presented in the copyright law context. The argument here demonstrates how the values promoted by cultural democracy are synonymous with the socially beneficial effects of the first sale doctrine. With that goal in mind, this chapter contextualizes and further elaborates the notion of cultural democracy by providing more concrete examples of how cultural democracy plays out in practice. In doing so, this chapter focuses on individuals' use of ebooks and the role of public libraries in the digital age.

BEYOND ECONOMIC EFFICIENCY

Over the past several decades in the U.S., the protection of copyright has continually been expanded and extended. In addition, copyright owners have expanded their monolithic control over their works through contractual arrangements such as a click-wrap license. The ever strengthening copyright protection has been supported by

exponents of the dominant law-and-economic theory of copyright law,[70] treating copyright as "the result of buyers' and sellers' undertakings, which the government simply enforces" (Netanel, 1998, p. 108). Judge Frank Easterbrook, one of leading exponents of this view, puts it thus: "A federal law of intellectual property may promote enforcement while duplicating the terms that would (presumptively) be set by contract. If Congress misunderstands the optimal terms, any of the entitlements pre-set in the law may be eliminated by contract" (Easterbrook, 1990, p. 114). This line of thinking helped copyright owners easily turn to contract law, resorting to licensing agreements that favored the owners and limited consumers' rights.

Proponents of economic efficiency (e.g., Breyer, 1970; Easterbrook, 1990; Landes & Posner, 2003) claim that the goal of copyright legislation is to maximize the wealth of society. Thus, when considering the consequences of copyright protection, these proponents value highly the economic "efficiency" or "welfare" of society as a whole (Brach & Syed, 2014). This narrow economic reasoning has been the dominant understanding of intellectual property, and many scholars view intellectual property "solely as a tool to solve an economic 'public goods' problem: nonrivalrous and nonexcludable goods such as music and scientific knowledge will be too easy to copy and

70 In this study, I use the following terms interchangeably: utilitarianism, law-and-economics approach, and incentive paradigm. This is not to imply they share exactly the same meaning, but for the purposes they serve here their differences are negligible.

share…unless a monopoly right in the ideas is provided for a limited period of time" (Sunder, 2012, pp. 24-25).[71]

The law and economics paradigm has ignored other normative values including the issue of distribution and furthering cultural participation of ordinary citizens. As Sunder (2012) argued, "(1) [the law and economics paradigm] fails descriptively as a comprehensive account of extant legal doctrine, (2) it fails prescriptively as the exclusive basis for deciding the important intellectual property conflicts of the day, and (3) it fails to capture fully the dynamics of cultural creation and circulation" (p. 25). The paradigm only focuses on the overall welfare, measured by money value, in the aggregate. The basic tenet of this economic efficiency approach is the "maximization of cultural output" (Sunder, 2012, p. 29). And this calculus does not confront "distinctions between the developed and developing worlds, the urban and the rural, and women and men, or among blacks, Asians, Latinos, and whites" (Sunder, 2012, p. 30). As Jenkins (2006) noted, "Current copyright law simply doesn't have a category for dealing with amateur creative expression…It surely demands reconsideration as we develop technologies that broaden who may produce and circulate cultural materials" (p. 198). The real issue is the drive toward monetization that benefits only a handful of copyright owners, depriving content consumers of opportunities to tinker with cultural works. Recognizing the limitations of the dominant economic account of copyright law, a growing body of

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[71] Intellectual works are nonexcludable, in that once they are created and made available to another person other than the creator, it is difficult to prevent others from enjoying them. Intellectual works are also nonrivalrous, in that one person's use of a creative work does not reduce others' ability to enjoy it. In other words, my use of creative expression does not compete with that of others.

scholarship on copyright has called for the necessity of outgrowing the dominant paradigm's narrow focus: having more goods circulate within society as a whole by giving incentives to creators.

As Sunder (2012) pointed out, alternative understandings of copyright law have paid attention to the word "culture." For example, such phrases like "cultural environmentalism" (Boyle, 2008), "free culture" (Lessig, 2004), "democratic culture" (Balkin, 2004), and "cultural democracy" (Bracha & Syed, 2014) elaborate normative values in the context of copyright. Democratic copyright theorists view copyright as a tool for protecting democratic values. One example of a normative value other than economic efficiency can be found in Yochai Benkler's argument on commons-based methods of production. He argues that commons-based methods of production can provide ordinary people more meaningful opportunities to participate in cultural meaning-making processes (Benkler, 2006). As I show below, the notion of cultural democracy has also been developed to provide an alternative understanding of copyright.

It is important to note that these alternative understandings of copyright law do not intend to supplant the underlying rationale of copyright legislation: giving creators incentive to create. The basic insight is still useful in formulating copyright policy and balancing legitimate competing interests between users of copyrighted works and copyright holders. Most proponents of alternative understandings of copyright law do not deny the importance of economic analysis in determining who gets the rewards of creative expression and how the "output" is distributed. Rather, challenging the dominance of the economic efficiency paradigm, they argue that the narrow economic

discourse needs to be supplemented by other "democratic" approaches to copyright law. Normative values such as self-determination and cultural democracy are valued by democratic copyright theorists. Some commentators argue that the economic efficiency paradigm needs to be complemented by insights from other disciplines, such as anthropology, cultural studies, philosophy, science and technology studies, and sociology (Cohen, 2012; Sunder, 2012). This chapter seeks to contribute to this tradition by showing that the notion of cultural democracy can provide theoretical justifications for adopting a digital first sale doctrine in particular and in general for reforming copyright laws. Below I provide a detailed description of cultural democracy, demonstrate what values the concept promotes, and illustrate the ways the concept can be understood in connection with ordinary citizens' engagement with cultural works.

THE CONCEPT OF CULTURAL DEMOCRACY

Many intellectual property scholars are devoting more of their attention to the term *culture* (Sunder, 2012). Culture is the sphere in which individuals' decisions about their own lives and collective decisions are made and various alternative options are considered. In the early twentieth-century, Rachel Davis DuBois developed the concept of "cultural democracy" while addressing the importance of intercultural education and the sharing of cultural values (DuBois, 1943; Graves, 2005). Dubois (1943) defined cultural democracy as "a conscious sharing of our cultural values—a creative use of differences" (p. 54). In the process of advocating the importance of promoting ethnic

heritage and cultural diversity, DuBois founded several groups, including the Inter-Cultural Education Workshop and Workshop for Cultural Democracy (Lambert, 1993).

DuBois (1943) argued that only in a democracy can a space be carved out where "a creative use of differences" can happen, and she called that type of cultural sharing *cultural democracy* (p. 5, emphasis in original). She contended further:

> To hold that each of these [various cultural and religious groups], as each individual, is entitled to its right to life, liberty, and the pursuit of its particular kind of happiness, as long as it does not interfere with the welfare of the whole, is the virtue of tolerance. But this is to be *merely* tolerant. Because society is one organic whole, it must be sustained by more than tolerance. It requires integration. Society needs to make a creative use of differences. (DuBois, 1943, p. 6, emphasis in original)

Her unique American voice in the 1940s resonated with other peace efforts underway during wartime and with civil rights. Arguably, cultural democracy has not received sufficient attention compared to political and economic democracy, although the notion of cultural democracy is equally important and these three domains are inextricably related (Graves, 2005).

Echoing DuBois, the 1976 Oslo Conference of the European ministers of cultural affairs offered that "Cultural democracy implies placing importance on amateurs and on creating conditions which will allow people to choose to be active participants rather than just passive receivers of culture. A cultural policy which aims at creating cultural

democracy must necessarily be decentralized. Decentralization must be considered both a means and an end in cultural policy" (as cited in Langsted, 1989).

DuBois advocated the importance of differences when the dominant philosophy of the time focused on assimilation; she argued for accepting and benefiting from diverse perspectives and cultures. Evrard (1997) explored the origin of, philosophical roots of, and links between the two paradigms: the democratization of culture and cultural democracy. Democratization of culture aims to "disseminate major cultural works to an audience that does not have ready access to them, for lack of financial means or knowledge derived from education" (Evrard, 1997, p. 167); this paradigm is concerned about outcomes rather than opportunities. By contrast, cultural democracy valorizes individuals' freedom to make their life choices based on their own preferences. The cultural democracy paradigm implies "an equality of opportunities, in which the market structure needs to be varied enough to respect taste diversity and satisfy each segment of taste" (Evrard, 1997, p. 173). That is, cultural democracy supports the value of individual tastes and encourages the acceptance of and benefits derived from the diversity of perspectives and cultures.

In a copyright context, cultural democracy refers to "an eclectic yet loosely connected group of normative accounts of intellectual property" (Bracha, 2007, p. 1843). This normative vision provides individuals with various life choices by ensuring that they can effectively participate in "*the semiotic shaping of one's own subjectivity*" (Bracha & Syed, 2014, pp. 255-256, emphasis in original). This dissertation also suggests cultural democracy as a normative value that seeks the maximization of individuals' self-

authorship and decentralized cultural meaning-making processes. Ensuring people have rights to participate critically in cultural meaning-making processes is important because culture plays an instrumental role in structuring our society and our lives (Sunder, 2012).

Balkin (2004) defined democratic culture as a culture where "individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals" (p. 3). He argued that individuals' ability to participate in cultural meaning-making processes is the core of democratic culture. This line of thinking is related to the concept of self-determination which values one's ability to effectively pursue his or her life choices and revise them freely (Bracha & Syed, 2014). Building upon liberal democratic theories, cultural democracy takes the notion of self-determination to the cultural sphere (Bracha & Syed, 2014). In that regard, cultural democracy and democratic culture are similar in terms of its core goals.

As long as one of primary goals of cultural democracy is considered to be promoting cultural diversity and the sharing of diverse cultural experiences to build a richer culture, books (and ebooks) should come to the forefront in terms of supporting the value of cultural democracy. Also important is acknowledgement that public libraries have played a significant role in realizing the ideal of cultural democracy in real life. Without access to knowledge and cultural works, meaningful participation in processes of cultural meaning-making cannot be guaranteed, not to mention the critical issue in a democratic society of supporting an informed citizenry. Below I describe in greater detail the particular values that are promoted by the concept of cultural democracy and their link to copyright's democratic values.

CULTURAL DEMOCRACY VALUES

Furthering Individuals' Self-Determination

The concept of cultural democracy expands the concept of self-determination to the cultural sphere (Bracha & Syed, 2014) and the realization of self-determination requires individuals' freedom of expression (Baker, 2002). It is important to note that self-expression liberties include not only individuals' freedom to express but also their ability to use copyrighted expressions based on existing cultural works (Baker, 2002).

Access to information is prerequisite to the realization of speech rights (Stein, 2006). The First Amendment protects and supports the speech rights of individuals, promoting access to media. Copyright laws also can define the boundary across which one can access information and enjoy creative works. Accordingly, the interrelationship and tension between free speech and copyright law has continually garnered attention (Goldstein, 1970; Netanel, 2008; Nimmer, 1970; Patterson, 1975; van Caenegem, 1995). Although many scholars have consistently claimed that copyright does not act as a roadblock for the realization of the public's speech rights, "free speech defenses are inconsistently interpreted and dismissed without due consideration" in intellectual property cases (Coombe, 1998, p. 77). Free speech activities, including making parodies or Internet memes, can be considered copyright infringement when fair use defense is not

applied. U.S. courts have often dismissed too easily free speech defenses when dealing with copyright infringement cases.[72]

Free speech and self-determination issues are intrinsically related to the question of how far or to what extent one can use and consume copyrighted expression by others. Bracha and Syed (2014) defined self-determination as "the ability of individuals reflectively to form and revise their own conception of the good, and effectively to pursue a life plan for realizing it" (p. 251). Several conditions should be met when one fulfills one's self-determination: 1) a variety of available options, 2) people's capability of understanding and evaluating those options, and 3) people's capability of critically revising their options (Bracha & Syed, 2014).

Without freedom of expression, self-determination would mean next to nothing. As Balkin (2004) contends, "[f]reedom of speech allows ordinary people to participate freely in the spread of ideas and in the creation of meanings that, in turn, help constitute them as persons" (p. 3). In other words, freedom of expression is a necessary condition for individuals to meaningfully engage with and participate in cultural meaning-making processes. Democratic theorists, including those in support of cultural democracy, assign weight to individuals' autonomy and active participation in meaning-making processes.

Continuing this line of thought, Bracha (2007) noted that one of the key themes of cultural democracy is "the maximization and empowerment of individual autonomy…[I]ndividual autonomy includes the freedom to interact in an active way with

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[72] Most notably, in the case of *Eldred v. Ashcroft*, the U.S. Supreme Court did not accept free speech arguments presented to the Court. Opponents of the 1998 Sonny Bono Copyright Term Extension Act argued that the Act was unconstitutional (*Eldred v. Ashcroft*, 2003). However, the U.S. Supreme Court did not accept that argument and ruled that the Act is constitutional.

existing cultural materials, to recreate and reshape them, and to express one's own voice through a dialogue with those of others" (pp. 1846-1847). This idea directly intersects the ways people access information, cultural products, and content. It is important to note that individual property ownership relates to the further development of individual autonomy. Macpherson (1973) viewed property as something "instrumental to a full and free life," arguing that individual property needs to include "a right to a set of power relations that permits a full life of enjoyment and development of one's human capacities" (p. 138). According to Amazon's Kindle Store Terms of Use, the purchase of ebooks through the Kindle Store is defined as simply use of content, thus essentially misleading consumers on the face of the transaction.[73]

As previous chapters have shown, consumers' rights are limited or restricted by the current licensing regime represented by "click-wrap," "browse-wrap," or "shrink-wrap" licenses (Radin, 2013; Reis, 2015). These licensing schemes usually employ boilerplate terms that require us to be bound by them (Radin, 2013). According to Amazon's Kindle Store Terms of Use, purchasing ebooks through Kindle Store is being

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[73] It is important to note that a property right is somehow socially constructed and subject to change, although the law does not really focus on people's expectations in transactions. People's expectations can also change over time as their social experience changes. We are increasingly moving toward a society where more and more people tend to enjoy cultural works through a Netflix-style subscription model. However, it is not entirely clear whether this trend is desirable for society as a whole. Clearly, one notable concern is the gap between the rich and the poor in terms of being informed with knowledge and being exposed to cultural works. Those who cannot afford to pay for information and cultural works will become more marginalized. The concept of cultural democracy values egalitarian opportunities for individuals to gain access to cultural works. It is worth noting that having a normative framework can be helpful for better keeping socially desirable values regardless of changing social experiences of individuals. A normative framework sometimes allows us to have stopgap models that are compatible with the chosen normative concept. A digital first sale doctrine can be considered one mechanism for accomplishing the goal of cultural democracy.

defined as use of content, and essentially misleading on the face of the transaction. In the majority of cases, boilerplate terms prevent digital content consumers from selling or transferring their legally obtained digital media. On the other hand, allowing digital content consumers to resell or transfer lawfully purchased files can be understood as giving them more autonomy and facilitating transactions of cultural works, in effect reinforcing a vision of cultural democracy.

Decentralizing the Cultural Meaning-Making Process

When it comes to traditional cultural policy, decentralization has mainly focused on geographical decentralization (Langsted, 1989). For example, decentralization has been referenced as relocating cultural venues such as theaters or sharing the state's economic responsibilities with local authorities. Langsted (1989) points out that in a new cultural policy, decentralization means paying increased attention to those groups that have been underserved in terms of the opportunity to participate in cultural activities. In addition, decentralization encourages interaction between consumers and producers of cultural works, and those cultural works need to be diverse in terms of form and content (Langsted, 1989). From a cultural democracy perspective, digital content consumers are not just passive consumers but regarded rather as active participants in cultural meaning-making processes. Participatory culture matters because it is linked to "promoting freedom, engendering equality, and fostering human and economic development" (Sunder, 2012, p. 64).

As Netanel (2008) contends, “From feminist fan fiction to mashups that meld white-bread music with hip-hop, creative appropriation gives individuals a voice, a means to challenge the ubiquity of mass media culture and the prevailing mores, ideology, and artistic judgments it represents” (p. 160). Creative appropriation of copyrighted works or the so-called participatory culture that Henry Jenkins and Yochai Benkler address allows individuals to raise their voice and in so doing contest the dominant cultural discourses. This possibility holds particular significance when we try to challenge or demystify taken-for-granted constructs (Sunder, 2012; Tang, 2011). As Sunder (2012) notes, “The liberty to contest hegemonic discourses has particularly profound possibilities for women and other minorities who have not traditionally had power over the stories that dominate our lives” (pp. 65-66). Cultural democracy intrinsically relates to engendering diverse voices and portraits of our culture by promoting ordinary citizens’ active participation in cultural meaning-making processes, rejecting the passive consumption of cultural works.

While the law-and-economics paradigm gives weight to individuals’ willingness and ability to pay for cultural works, distribution schemes appropriate for those unable to pay fall outside the paradigm’s primary concerns. Due to the lack of purchasing power of the poor, lower income individuals do not greatly benefit from the creation of more cultural works under the strong economics approach. In this respect, when it comes to issues such as inequality in access to cultural works, the law and economics paradigm, which values the creation of more creative works and overall increase of people’s welfare measured by individuals’ willingness and ability to pay, cannot fully address distributive

concerns. Cultural democracy can, on the other hand, justify distributive equity considerations in the context of copyright (Brach & Syed, 2014).

Today ordinary citizens' interaction with cultural works is largely mediated by access to the Internet and broadband. Yet even as broadband seems to be an integral part of our daily lives, not all Americans are enjoying its economic, social, and cultural benefits. As of 2013, a high-speed Internet connection is not available among 31.4% of U.S. households with an annual income less than $50,000 and children ages 6 to 17 (Pew Research Center, 2015). In addition, a broadband disparity between rural and urban areas of the country has been well documented (Strover, 2001, 2011). A recent study by Whitacre, Gallardo, and Strover (2013) examined the broadband adoption gap between metro and non-metro areas and reported that there was a consistent 13% gap in household broadband adoption between 2003 and 2010.

Given this reality, until recently, policy efforts for bridging the digital divide have largely focused on increasing broadband access and adoption. However, it is important to note that "if policy efforts directed to remediating the digital divide continue to focus primarily on access, which is easier to measure, compared to digital literacy and competency, the divide is liable to continue" (Strover, Flamm, & Sang, 2013, p. 29). A great deal of attention should be directed to increasing digital literacy and competency. Particularly public libraries' role in "cultivating opportunities for participatory learning and co-creation that are hallmarks of digital culture" deserves more attention in the context of cultural democracy (McShane, 2011, p. 393). If individuals do not know how to participate in cultural meaning-making processes in a connected society, they are

likely to remain unconnected and apart from others, which runs against the normative ideal of cultural democracy.

Helping Libraries Fulfill Their Mission

Public libraries are central cultural institutions in many western democracies. They exist "to promote a public good" (Darnton, 2009, p. 11). As Palfrey (2015) notes, "The knowledge that libraries offer and the help that librarians provide are the lifeblood of an informed and engaged republic" (p. 10). Libraries can be central to cultural democracy. In addition to preserving cultural works, public libraries have provided access to them, facilitating people's engagement with and contributions to the nation's cultural heritage and help their life-long learning experiences. The notion of cultural democracy is synonymous with the mission of public libraries. Because participating in cultural meaning-making processes first requires access to cultural works, libraries have played a significant role in providing access points for ordinary citizens. However, as culturally significant works are increasingly distributed in digital formats, addressing digital content effectively in terms of transferring cultural works over time and space, whether in libraries or other institutions, is of paramount importance.

The threats to the first sale doctrine and the ebook licensing thus figure in libraries' future mission. In the age of licensing, libraries are facing difficulties in addressing various licensing models imposed by content distributors, significantly limiting libraries' capacity to provide access to culturally significant digital content. The availability and pricing of ebooks has been a major concern of library communities. As

shown in Chapter 4, when it comes to ebooks, publishers often impose much higher prices on libraries; they can choose not to sell ebooks to libraries; they can even eliminate library access to their new releases. In November 2011, Penguin made its new ebook titles inaccessible to library patrons.[74] Libraries cannot maintain access to content equivalent to what they can in cases where the first sale doctrine is applied to them (Lipinski, 2014). They have encountered problems associated with adding ebooks to their service catalogs so that patrons are able to access them (Breeding, 2013; Brook & Salter, 2012). Given that libraries have provided individuals who cannot afford the primary markets with free and unfettered access to knowledge and cultural works, the current problem libraries are facing warrants serious attention.

The increasing reliance on licensing presents a problem to libraries because licensing tends to employ restrictive agreements. Licensing agreements are regulated by contract laws, which make it difficult to impose legal limits on those contractual agreements between the libraries and content distributors (Lipinski, 2014). That said, some efforts have tried to address the problem. Collecting culturally significant works among digital content licensed by Creative Commons or by the Digital Public Library of America's initiative are good examples of those efforts. Based on the "free to all" principle, the Digital Public Library of America, since its official launch in 2013, has served as a core digital platform for a wide range of hub-libraries and hub-institutions that hold digital collections; additionally, it provides access to digital cultural works for

[74] See http://www.ala.org/news/mediapresscenter/americaslibraries/soal2012/new-focus-on-ebooks

those that use hub-organizations (Palfrey, 2015). The primary goal of the Digital Public Library of America is to encourage "the active participation of citizens" (Palfrey, 2015, p. 101). In addition to providing access to digital cultural works, the Digital Public Library of America helps citizens "contribute materials in their possession to a national data" (Palfrey, 2015, p. 102). Contributions by ordinary citizens involve their active participation in the process of cultural meaning-making, thereby helping to achieve another value promoted by cultural democracy.

One of the key features of cultural democracy is facilitating ordinary citizens' participation in cultural meaning-making processes which is in accordance with the mission of public libraries. This dissertation argues that the best way to incorporate cultural works both exhaustively and effectively in the digital age is to challenge the current copyright legislation and to enable libraries to better meet the needs of the public. The goals of providing access to information and enabling people to participate in cultural meaning-making processes are particularly important to libraries' mission of serving economically vulnerable populations, because in many cases the poor and homeless cannot afford to purchase cultural resources and public libraries are only places where they can access cultural works. As the American Library Association (2014) noted in one of its policy statements, it is "crucial that libraries recognize their role in enabling poor people to participate fully in a democratic society, by utilizing a wide variety of available resources and strategies" ("Library Services to the Poor," n.d., para. 1). The Copyright Act also recognized the necessity of having exemptions for public libraries and archives. For example, Section 108 allows libraries and archives to reproduce

copyrighted works and distribute copies of those copyrighted works, with exemptions from copyright infringement under certain conditions. In 2006, an independent committee of the American Library Association under sponsorship of the United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress sought to update Section 108 in response to the challenges of the digital age. The "Section 108 Study Group" issued an independent report in 2008 that includes a set of recommendations.[75] However, the Study Group's report did not reach agreement on several controversial issues. For example, it provided no suggestions regarding the digital first sale doctrine or temporary copies of digital works made in the process of accessing unlicensed works. Inasmuch as public libraries have functioned as core institutions that further democracy, their mission should continue to receive support under the copyright law even in the digital age.

CULTURAL DEMOCRACY IN PRACTICE

Understanding the cultural sphere is germane to a vision of cultural democracy (Bracha & Syed, 2014). The very essence of self-determination is the ability of individuals to critically and independently consider and reconsider various life choices and pursue their own life plans (Dworkin, 1988). Thus, applying the basic conditions of self-determination to the cultural domain necessitates the following conditions: that

[75] See http://www.section108.gov/docs/Sec108StudyGroupReport.pdf

meaningful choices are available to individuals as well as equal opportunity for everyone to participate in cultural meaning-making processes.

This brings us back to earlier concerns with digital first sale. Basically, adopting a digital first sale doctrine provides users of digital goods with freedom to resell, rent, or lend their lawfully purchased goods. From the perspective of self-determination, such provisions are desirable consequences as they bestow more freedom on individuals with regard to their possessions (or what they believe are their possessions). However, from the perspective of copyright holders, the adoption of a digital first sale doctrine may be viewed as favoring copy owners over copyright holders because of limitations placed on the distribution rights of copyright holders.

One may ask why we should care about ordinary citizens' freedom to transfer the ownership of their lawfully purchased works and why we should favor the freedom of users over that of copyright owners. Proponents of the law-and-economics approach may ask: Is there any good justification for granting users this right? The cultural democracy response is that giving digital content consumers more freedom to tinker with and interact with their possession—including transferring ownership of their lawfully purchased works—promotes one's self-determination.

The normative concept of self-determination may not be enough to fully address the question of favoring users' freedom because if we treat everyone's opportunity to maximize their own subjective preferences equally, we may need to "equally" protect copyright holders' freedom to earn more money by exerting their control over their copyrighted works. Here the notion of cultural democracy provides a justification for

favoring ordinary citizens' freedom to access and use cultural works. When weighing the simple earning of more money through copyright protection and realizing one's life goals (such as a musician or writer) by being exposed to and consuming more cultural works, cultural democracy gives more importance to the latter. Those life goals do not have to be professional. Creating and distributing user-generated content can be considered the realization of one's life choice. Allowing broader access and cheaper access is good thing because it helps ordinary citizens define and form their life plans without constraints. In addition, cultural democracy puts a great deal of value on promoting a participatory culture. Thus, giving favor to digital content consumers is justified.

Recent developments in the cultural domain provide a concrete context in which the notion of cultural democracy can play out. One implication of cultural democracy is a more robust working environment because it might open up the possibility for people to choose creative occupations or careers. In today's cultural sphere, with the help of the Internet and digital technologies, ordinary citizens are increasingly exerting their right to participate in various forms of cultural meaning-making processes. The growing literature in participatory media, whether it be the creation of fan fiction or peer-to-peer collaboration efforts or remixing, ably documents this (Burgess & Green, 2009; Scott, 2015). As Fisher (2010) notes, "[technology] has radically increased the ability of innovating users to communicate with each other—to exchange ideas concerning techniques and products, and to form communities centered on their shared interests" (p. 1430).

The "innovating users" can even make a lot of money through social media outlets such as YouTube. Consider Sweden's Felix "PewDiePie" Kjellberg, one of the biggest stars among YouTube users. By posting his videos to YouTube, this Swedish video-game commentator made, in 2013, over $4 million through ad revenue (Moss, 2014). He started uploading his videos "motivated primarily by a combination of curiosity and passion" (Fisher, 2010, pp. 1433-1434).

Now it is difficult to tell whether the "innovating users" are amateurs or professionals. It is not difficult to find ordinary people who make several millions from his or her own YouTube channel by commenting on or making derivative works based on preexisting videos or other creative works (Jacobs, 2014). Not only are they making money by participating in cultural meaning-making processes, their activities sometimes enable them to find a new profession. Michelle Phan, for example, has several million YouTube subscribers for her videos about how to shop and use cosmetics. She was hired by Cosmetics company Lancome to be the company's official "video makeup artist" (Farnham, 2012). As of September 2014, she had over 6.9 million subscribers, her own line of makeup and online subscription service called Ipsy (Brouwer, 2014).

The ubiquitous presence of user generated content is important because it opens up opportunities for other users to build on preexisting creative works, generate new cultural works, and share them, which eventually serves as a catalyst decentralizing cultural meaning-making processes. In this sense alone, the digital environment, with its "relative ease of commenting on others' cultural expressions and making one's own

content destabilizes traditional cultural authorities, making that authority more transparent and contingent" (Sunder, 2012, p. 58).[76]

In pre-digital media worlds, the participation by individuals in the process of cultural meaning-making often was mediated by books and other print material. Even today, books serve as the primary source for individuals to access knowledge and cultural expression by offering a wide range of perspectives and experience across time and space. Books provide opportunities for individuals to become informed citizens in a democratic society and in that way books have enjoyed a deep and long-lasting influence on people's entire lives. Individuals' literacy is enhanced as a result of their interaction with books, regardless whether her literacy was gained through formal or non-formal education or through meaningful conversations with other readers. Consequently, reading books has served as a prerequisite for individuals to participate in the processes of meaning-making processes, politically as well as culturally. Below I describe examples of contemporary participatory culture that are "instrumentally and intrinsically related to promoting freedom, engendering equality, and fostering human and economic development" (Sunder, 2012, p. 64). As shown in previous chapters as well as in this chapter, the core values that cultural democracy promotes are synonymous with the values of participatory culture advocates. Based on liberal political theories, the notion of cultural democracy provides a theoretical explanation of why "participation" matters.

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[76] Having said that, it is important to note that the democratic potential of user-generated content online is often hampered by the censorship of platform providers who are governed by the DMCA notice-and-takedown system.

Although not all types of cultural activities are directly attributable to books (or ebooks), literacy and education that enable citizens to participate in activities all stem from the fact that books (or ebooks) play a significant role in furthering a participatory culture. Indeed, it is impossible to imagine active and meaningful discussions in classrooms, cafes, book clubs, and elsewhere without the mediation of books. Consider the Harry Potter Alliance (http://thehpalliance.org/). Cultural democracy looks upon consumers as active participants in cultural meaning-making processes rather than viewing them as merely passive consumers.

The Harry Potter Alliance is a good example of how people are actively interacting with cultural works in a meaningful way. This real-world organization was established in order to bring positive changes to society by encouraging readers of the Harry Potter book series to become engaged with societal issues, such as human rights, equality, and literacy. Sunder (2012) notes, "Through the Alliance children are coming together to form an army of young citizens dedicated to upholding the Potter books' values of being kind, having the courage to question authority and cultural norms, and fighting for justice in the real world" (p. 69). As of this writing, members of the organization are scattered across 25 countries and 43 states in the U.S. and among tasks they have accomplished so far include the shipment of life-saving supplies to Haiti, the donation of books to build community libraries, the partnering with public advocacy groups such as Public Knowledge to raise public awareness of important social issues

like network neutrality, the initiation of public campaigns, and the establishment of funds to support people who are suffering in Sudan and Burma.[77]

Below I discuss other examples of user activity related to participatory culture. Having access to preexisting works and consuming them come before the creation of cultural works. Creators, including writers, need to quote something or borrow characters or narrative structures from previous novels, plays, or folktales. This is particularly true in the case of fan-fiction writers. A large portion of fan and user-generated content is created based on preexisting cultural works. On the Internet, memes[78] are generated by adding brief and humorous phrases to preexisting videos or images and circulated to share cultural ideas or messages. Digital mashups are also made by mixing two or more preexisting cultural works to create new digital works (Fisher, 2010). One notable example of digital mashup is The Grey Album by Brian Burton which combined a portion of the Beatles' The White Album with hip-hop musician Jay-Z's The Black Album (Fisher, 2010). Later, Laurent Fauchere and Antoine Tinguely created the Grey Video by integrating a portion of The Grey Album with some parts taken from the Beatles' movie, A Hard Day's Night, and a video performance by Jay-Z (Fisher, 2010). Teamed with iTunes and GarageBand, Radiohead has allowed its fans to remix the band's own musical tunes (Sunder, 2012; Ubben, 2011). These digital mashups allow people to rework preexisting cultural works and some creators like to share their remixes

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[77] See http://thehpalliance.org/what-we-do/success-stories/

[78] The online version of the Merriam Webster dictionary defines meme as "an idea, behavior, or style that spreads from person to person within a culture" (See http://www.merriam-webster.com/dictionary/meme).

with others under Creative Commons licenses (Sunder, 2012), which is in line with the core of cultural democracy.

A host of culturally meaningful user-generated contents (YouTube videos, memes, mash-ups, fan fiction stories and so forth) exist in a legal grey area (Sunder, 2012). To be a creator, people need to access, as much as possible, to preexisting creative works. This is also true for any writer. To promote cultural progress, it is critical that access to creative works is assured. Under the current copyright law, it is not clear to what extent remixes, mashups, and derivative works fit within the copyright law.

THE LINK BETWEEN CULTURAL DEMOCRACY AND THE FIRST SALE DOCTRINE

As shown in Chapter 2, a large number of scholars have called for a broader application of copyright's first sale doctrine in the digital context because it advances desirable social outcomes (see Asay, 2013; Calaba, 2002; Hess; 2013; Mattioli, 2010; Perzanowski & Schultz, 2011; Reis, 2015; Serra, 2013; Smith, 2005). As I demonstrate below, drawing on the notion of cultural democracy would more fully achieve copyright legislation's goals (i.e., balancing competing legitimate interests between copyright holders and users of copyrighted material, promoting advancement in science and useful arts, etc.).

The desired effects of the first sale doctrine include ensuring greater access to informative, scientific and cultural works, protecting consumer welfare and privacy, and promoting market innovation. These were the motivations in enacting the principle. To illustrate the relationship between the first sale doctrine and the notion of cultural

democracy, I discuss the policy effects of having a digital first sale doctrine, particularly on ebooks. While this discussion does not address all nuances of the ebook ecosystem, it does consider some of the key policy effects: enhancing availability, affordability, innovation, and preservation.

Availability

Copyright owners may want to make their copyrighted works unavailable for a variety of reasons. One possible scenario is that copyright owners may allow their books to go out of print when they think printing those books is not economically viable (Hess, 2013). More than 97 percent of books published in the United States between 1927 and 1946 were "commercially dormant and inaccessible" in the early 2000s (Hess, 2013, p. 1973). In addition, copyright owners sometimes change their views on their work and want to suppress the distribution of that work (Reese, 2003). For example, Tony Kaye, British film director, attempted to remove his name from his film *American History X* and even tried to impede the success of the film (Hess, 2013). However, the presence of secondary markets allows people to access out-of-print books or other creative works. A digital resale market could help digital works be more easily accessible and make it difficult for copyright holders to completely control the availability of their works (Reis, 2015).

Previous studies have shown that one of the most common reasons for people getting involved in illegal downloading is related to practical concerns such as cost and

availability (Kozlowski, 2012; Sang, Lee, Kim, & Woo, 2015).[79] Consider this example. Official ebook versions of the Harry Potter series were not available on the Pottermore ebookstore until early 2012 (Owen, 2012). Founded by the author of Harry Potter series, Pottermore has been providing Harry Potter fans ebook versions of the Harry Potter novels. When Harry Potter ebooks were available for the first time through Amazon, people could only complete their purchasing process by visiting Pottermore ebookstore through a link provided by Amazon (Jones, 2012). Before the Harry Potter series was officially available in digital format, the series comprised the most pirated books of all time (Kozlowski, 2012). The connection between piracy and the potential effects of digital secondary markets has not garnered enough attention yet. By having more affordable and accessible digital secondary markets, piracy of digital goods may decrease given that previous studies have reported that people tend to illegally download content when they cannot find legitimate and affordable routes to purchase digital goods.

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79 The legality of peer-to-peer file sharing is also not entirely clear under the current copyright regime. In the *Betamax* case, the U.S. Supreme Court recognized that millions of VTRs were in use by Americans and those VTRs can be used for both infringing and substantial non-infringing uses. However, when dealing with peer-to-peer file sharing cases, courts did not follow the *Betamax* court's reasoning. The Supreme Court's approach with regard to the "substantial non-infringing" uses deserves more attention when courts deal with peer-to-peer file sharing cases. In addition, the *Betamax* court's attention to *how* people actually use a particular technology deserves more attention in subsequent cases. The notion of cultural democracy encourages the sharing of knowledge and cultural works, however, it does not support "illegal downloading." It is important to note that democratic copyright theories do not deny the fact that one of the primary purposes of copyright legislation is to incentivize creators to create cultural works. Democratic copyright theories acknowledge the usefulness of economic analysis in the context of copyright. Therefore, support for the notion of cultural democracy is not directly related to support for illegal peer-to-peer file sharing activities. Scholars have addressed the issue of peer-to-peer file sharing. For example, Professor Lawrence Lessing suggested that the peer-to-peer culture might be addressed by adopting compulsory licenses (Rainsford, 2003). Nearly two decades ago, Litman (1996) noted that we may need to "refashion our measure of unlawful use" of copyright works in the digital age (p. 48). This dissertation extends Litman's observation by arguing that core values encouraged by cultural democracy can and should provide the framework for copyright reform. When updating and revising copyright laws, policymakers should be alerted that "one central goal of copyright is to limit the monopoly given to the copyright owner so that he or she cannot force citizens to pay for every single type of use" (Boyle, 2008, p. 76).

Affordability

As McKenzie (2013) aptly noted, "Libraries and second-hand markets serve as crucial, low-cost sources of knowledge for many underprivileged or undereducated individuals, and we should not justify a policy that would inhibit their growth in the digital age" (p. 70). The existence of a digital resale market promotes retail price competition, which in turn benefits consumers. In a market where consumers can purchase secondary digital goods that are no different from original goods in terms of quality, secondary digital goods drive prices down, as well as facilitate the exchange of used digital works due to the fast, effortless, and costless transactions among transaction participants around the globe (Mattioli, 2010). More importantly, the first sale doctrine allows people to choose between two tier markets through the mechanism of price differentiation, giving more affordability to consumers.

One may argue that consumers may end up paying even higher prices for purchasing digital goods because digital goods do not (as far as we know) degrade over time, which may lead producers to increase retail prices. Although that possibility does merit concern, it is unlikely to be the case. Publishers can, after all, use a price differentiation strategy.

College students also can benefit from digital resale. It is well known that textbooks are quite expensive in the United States. The average U.S. college student pays approximately $655 per year to purchase textbooks and supplies, while, after financial aid, the average student attending a four-year public college pays about $2,900 for their

annual tuition (Weissmann, 2013). The Bureau of Labor Statistics's data shows that as of 2013 the cost of course materials had increased more than 800 percent since 1978, while the same data indicates a 325 percent increase in home prices, a 250 percent increase in consumer price index, and a 575 percent increase in medical services (Weissmann, 2013). At semester's end, college students often resell their textbooks to help offset these costs. As long as the first sale doctrine is not applicable to ebooks, physical textbooks carry economic advantages because students can resell their paper textbooks and recoup their previous investment so that the prohibition of resale of digital copies may serve as a barrier to the wider adoption of ebooks in schools (Mattioli, 2010).

Publishers put restrictions on which ebooks are available at certain libraries and control the ways in which library patrons consume ebooks (Vaccaro, 2014). For instance, some publishers such as Harper Collins do not allow a library to lend ebooks out more than 26 times unless the library repurchases the license. Libraries had to pay $74.85 to buy Sheryl Sandberg's best-selling ebook titled *Lean In*, released in 2013, while consumers could purchase it at $12.99 (Vaccaro, 2014). If the first sale doctrine applied to digital goods, publishers would be less likely to make it difficult for libraries to buy and lend ebooks, although the possibility is largely contingent upon whether the current licensing regime is changed. By imposing enough restrictive language when providing libraries access to ebooks through licensing, copyright holders can foreclose the legitimate rights of purchasers and libraries. However, a digital first sale doctrine will allow libraries to purchase secondary ebooks from the market at a low price. There is no

doubt that this will, in turn, allow people who could not otherwise afford to buy ebooks to be able to enjoy them through libraries.

The broader argument is that for those who cannot afford to purchase new ebooks, secondary markets for ebooks can provide a way to fulfill their needs:

> Many pensioners and people who faced life changing disabilities are downloading and pirating ebooks. They simply are in a position where their monthly income is not enough to sustain their entertainment needs, which become more expensive every year. After bills, food, and expenses, there is not enough money left over to entertain yourself. It is easy to feel sympathy towards this demographic of people, but in effect it hurts the entire industry. (Kozlowski, 2012, para. 6)

In sum, consumers can benefit from secondary markets because they can more easily obtain copyrighted works at cheaper prices. Libraries will be in a better position if they can purchase pre-owned ebooks through secondary markets when they have to negotiate with publishers. All in all, as long as we are concerned about the development of our culture, making more creative works available is critical. As Cohen (2012) notes, "without the raw materials necessary for social and cultural participation, one cannot participate meaningfully in the development of culture and community" (p. 224).

Promoting Innovation

The existence of secondary markets leads to product innovation because producers of original products must constantly provide updated products in order to

compete with lower-priced products available in secondary markets. Consumers also can tinker with their copies without worrying about copyright infringement, and through this process product innovation can occur. The discussion of adopting a digital first sale doctrine brings to the fore the issue of ebook interoperability. It is important to note that interoperability can increase the overall value of a given technological ecosystem because it can lead to more transactions and it can lower costs for producers. For instance, if technological standards were applied to the ebook ecosystem, those who would purchase an ebook on iBooks would not have to worry about whether his or her ebook can be read on Kobo or Nook. Thus, consumers are likely to purchase more ebooks. The existence of secondary markets also could promote more transactions (Mattioli, 2010). If consumers can resell their ebooks, the possibility of recouping one's money spent on ebooks would allow consumers to buy more ebooks.

Once secondary markets exist, content providers, platform providers, and other pertinent stakeholders would be likelier to consider various ways in which they could enhance their competitiveness in the market. As McIntyre (2014) aptly noted, "the first sale doctrine and competition are intrinsically linked" (p. 45). In addition, some argue that interoperability generally tends to yield, in most conditions, innovation, although the relationship between interoperability and innovation is highly complex and context-specific (Gasser & Palfrey, 2007).

To explore an often assumed causal relationship between interoperability in ICTs and innovation, Gasser and Palfrey (2007) examined three cases in which the issue of interoperability played out: digital rights management in music distribution both offline

and online, various forms of digital identity systems, and web services. Based on in-depth case studies of the three cases along with in-depth interviews and expert workshops, they concluded that "increased levels of ICT interoperability generally foster innovation. But interoperability also contributes to other socially desirable outcomes," such as the positive impact on "consumer choice, ease of use, access to content, and diversity, among other things" (Gasser & Palfrey, 2007, p. 12).

Currently, major ebook retailers such as Amazon and Apple are operating closed ebook ecosystems that limit customers' freedom to choose other retailers' products. Providing access to ebooks has become increasingly a common way to deliver monographs in many libraries, but the lack of standardization in ebooks can limit libraries' ability to serve their patrons. For instance, if a certain digital book is only available through a particular format, libraries should purchase other books that can be read in a different format.

Preservation

Not surprisingly, copyright holders, while providing users with access to digital copies through restrictive license agreements, are largely silent about facilitating preservation of cultural works. Both individuals and society as a whole benefit from preservation of cultural works because preservation helps people access copyrighted works that may not be available through copyright owners anymore (Perzanowski & Schultz, 2011). Many books are only available in digital format, which in terms of preservation is problematic. For example, an author of a novel can publish her book as an

ebook-only option and later decide to eliminate it from the market. In this case, if that book is licensed under, for example, the Kindle Store Terms of Use, there is no way for individuals to legally access that ebook. Libraries are challenged because they cannot preserve cultural works if they do not purchase a license. As shown in the Table 2 below, licensing periods vary and in most cases are not perpetual.

Table 2. Library Lending Terms and Pricing

Publisher	Library lending terms	Library pricing	Available through	Consortium access
Penguin Random House—Random House	All titles available under perpetual licensing. No loan limits or period of use limits.	Varies, but is generally 3 to 4 times hardcover price for the ebook	Overdrive, 3M Cloud Library, B&T Axis 360, Ingram, follett, Recorded Books, Kno, Mackin, Findaway (Audio-only), EBSCO (3/3/2015)	Consortium licensing permitted for public, academic and school libraries.
HarperCollins Publishers	License must be renewed after 26 loans.	Varies, but generally not more than the cost of hardcover equivalent and often much less.	OverDrive, 3M, B&T, Bolinda, Booksource, Feedbooks, Gardners, Mackin, Odilo, One-Click Digital and Perma-bound.	Consortium licensing permitted for public, academic and school libraries.
Macmillan	All titles are available for a 2 year/52 lend period (whichever comes first).	Titles published less than 12 months ago: $60.00. Titles published 12 months ago or more: $40.00.	OverDrive, B&T Axis 360, 3M Cloud Library, Recorded Books (One Click Digital), Odilo, Feedbooks (Europe and Canada) and Gardners (mostly UK) (3/25/2015).	Consortium licensing permitted as of September 12, 2014. Public and academic libraries may license individually or through consortia. School libraries may license individually only. (2/11/2015)
Penguin Random House—Penguin Group USA	A one-year expiration date on ebooks licensed to libraries (4/2/2013).	Library pricing similar to what is offered to individual consumers. Pricing information not confirmed at this time. (4/2/13)	OverDrive, 3M Cloud Library, B&T Axis 360, Follett, Recorded Books, Kno, Mackin, Findaway (Audio-only), Bookstore (3/3/2015)	Consortium licensing permitted for public, academic and school libraries. (3/3/2015)

Table 2 (continued)

Simon & Schuster	A one-year expiration date on ebooks licensed to libraries.	Prices are generally more than the cost to a consumer, but less than the hard cover edition.	OverDrive, 3M Cloud Library and Baker & Taylor Axis 360, Recorded Books, Odilo, and Bibliocommons (3/25/2015)	Consortium licensing permitted for public libraries only. No provision for licensing to academic libraries individually or in consortia. Licensing to individual school libraries only. (2/26/2015)
Hachette Book Group	New ebooks will be released simultaneously with the print edition and sold for an unlimited number of single-user-at-a-time circulations.	Pricing is always at HBG's sole direction. HBG's pricing is 3 times hardcover. (3/9/2015)	OverDrive, 3M Cloud Library, Baker & Taylor Axis 360, Mackin, Follett, EBSCO, OneClick Digital and Permabound. (3/9/2015)	Consortium liccensing determined by HBG on a case-by-case basis using criteria including number of libraries, size of population and circulation numbers. Publics, academic and school consortia can be considered. (3/9/2015)

Note. Adapted from American Library Association. (2015). *Big five publishers and library lending.* Retrieved from http://americanlibrariesmagazine.org/wp-content/uploads/2015/04/BigFiveEbookTerms042215.pdf

The issue of making duplicate copies for archival preservation can be addressed in the context of fair use, but the first sale doctrine clearly helps libraries and archives to fulfill their mission of preserving cultural works (Reis, 2015). As Perzanowski and Schultz (2011) points out, "if we wish to preserve the benefits of access, preservation, privacy, transactional clarity, user innovation, and platform competition, we must find a

way to reinvigorate exhaustion in the face of digital distribution and technological protection measures" (p. 945).

CONCLUSION

In this chapter, I have demonstrated the ways in which the notion of cultural democracy can promote socially beneficial policy effects of the first sale doctrine, such as promoting affordability and availability, preservation, and innovation of creative works. The implications of the concept for digital content consumers and their access also is addressed. Cultural democracy embraces the realization of ordinary citizens' self-determination through active participation in the cultural domain. It also implies a commitment to the decentralization of meaning-making power (Bracha & Syed, 2014). In addition, the values advocated by cultural democracy are compatible with those of public libraries, public institutions that cannot be fully supported by economic efficiency practices.

In the digital age, enabled by digital technologies and the Internet, ordinary people are increasingly powerful in terms of their ability to challenge cultural authorities (Sunder, 2012). New media technologies have lowered barriers to entry into the process of cultural production and distribution, although access to technology itself does not guarantee people's active and critical participation in cultural meaning-making processes. Before the widespread availability of the Internet, individuals and disempowered communities struggled against remaining passive recipients of the mass culture (Sunder, 2012). What matters here is that even though technological developments have opened

opportunities to challenge cultural authorities, the current copyright system is not ready to fully embrace the potential of participatory culture. As noted above, mash-ups, remixes, and a great deal of user generated content are vulnerable to copyright infringement claims because current copyright law does not clarify their legality or because legal access must be fought on a case-by-case basis. This chapter has addressed the question of how the concept of cultural democracy can provide a solid theoretical ground for adopting a digital first sale doctrine to realize its policy implications in the digital environment. In the next chapter, I provide policy recommendations regarding the digital first sale doctrine.

Chapter 6: Policy Recommendations and Conclusion

CULTURAL DEMOCRACY IN ACTION

When it comes to copyright law and policy, a dominant justification for copyright protection has been economic efficiency. In fact, over the past several decades, the claim of economic efficiency has led to copyright protection being dramatically bolstered. However, our conventional understanding of copyright legislation and its purpose have been newly challenged by new cultural phenomena that ordinary users of digital content have popularized—phenomena such as contemporary participatory culture and remix culture, the Open Source and Creative Commons movements. For example, the European Commission's recent initiative which requires the results of publicly funded scientific research to be published in open access journals is not compatible with economic efficiency paradigm.[80] Economic efficiency cannot fully address contemporary societal issues pertaining to copyright because of the narrow understanding of "welfare"

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80 In 2003, the European Union issued a directive that governs people's reuse of data that belong to the public sector. Arguably, the European Union has been a pioneer in terms of facilitating the ideal of open access, although the first government-owned open access data portal (www.data.gov) was established in the United States in 2009. The European Commission's recent initiative is "to [optimize] the impact of publicly-funded scientific research, both at European level…and at the member state level." (See http://ec.europa.eu/digital-agenda/en/open-access-scientific-information#Newsroom) Here, the term "scientific" applies to all kinds of academic disciplines. It is worth noting that the requirement does not mean that the funding recipients *should* publish their research results in open access journals. They can decide not to publish their research results, but once a decision is reached to publish results then the European Commission's policy applies (See http://www.science-metrix.com/pdf/SM_EC_OA_Data.pdf).

permitted by economic efficiency. According to economic efficiency, welfare is measured by monetary value—individuals' willingness and ability to pay. The societal values that copyright can deliver are not limited to economic interests, and copyright should be expected to contribute to cultural values related to class equity, access, free speech, democracy, among other such outcomes, whether or not they can be translated into economic value (Vaidhyanathan, 2001). Furthermore, the economic efficiency paradigm very rarely addresses distributive concerns.

Acknowledging the limitations of the economic efficiency paradigm, a growing number of scholars have addressed the necessity of restoring balance by resorting to alternative understandings of copyright protection (Boyle, 1997, 2008; Bracha, 2007; Bracha & Syed, 2014; Coombe, 1998; Davies, 2002; Elkin-Koren, 1996; Gautam, 2014; Gillespie, 2007; Herman, 2013; Lessig, 2001, 2006, 2008; Litman, 1996, 2006, 2010; Netanel, 2008; Patry, 2011; Postigo, 2012; Sunder, 2012; Tang, 2011; Vaidhyanathan, 2001).

Although those studies have addressed and challenged a wide range of problematic conditions with regard to the current copyright regime, not all have provided a cohesive theoretical justification rooted in normative theories of copyright. Some studies simply assume that it is good to give users of creative works more access to creative works and to enable them to interact with those works more freely. This dissertation, building on the notion of cultural democracy, has sought to address the gap by identifying the ways that a normative theory can provide the philosophical foundation for endorsing a digital first sale doctrine.

To a large extent U.S. legal scholarship has been dominated by liberal political theory (Cohen, 2012). Terms like "freedom," "autonomy," and "rational choice" have pervaded law and policy debates. As shown in the previous chapter, cultural democracy extends the concept of self-determination to cultural domains. Advocating the necessity of adopting a normative framework for promoting "human flourishing," Cohen (2012) also paid attention to the relationship between the material configuration and the everyday practice of what she calls "situated users." She points out that people are situated in a material landscape, arguing "Our beliefs, goals, and capabilities are shaped by the cultural products that we encounter, the tools that we use, and the framing expectations of social institutions" (p. 2). She notes that those "situated users" play with cultural artifacts in their daily lives and "the play of everyday practice is the means by which human beings flourish" (p. 57). In this process, they sometimes adapt or remix existing creative works and make derivative works. Thus, giving people meaningful opportunities to participate in these cultural meaning-making processes is critical for promoting cultural progress (Bracha & Syed, 2014). In addition, ensuring participation is also important in terms of helping political processes to function well and create an attractive society (Fisher, 1998). Habermas (1996) addresses the importance of facilitating an expressive public sphere as an essential venue for making collective decisions. In a similar vein, Fisher (1998) also notes that "In an attractive society, all persons would be able to participate in the process of meaning-making….Active engagement of this sort would help both to sustain several of the features of the good life—e.g., meaningful work and self-determination—and to foster cultural diversity" (pp.

1217-1218). The notion of cultural democracy provides a theoretical ground for addressing the question of what copyright law ought to be in the digital age.

In a world where copyright protection has dramatically increased, ordinary people are increasingly deprived of their autonomy and freedom to interact with existing creative works. Under the widespread usage of (perhaps virtually default usage of) licensing agreements that restrict digital content consumers' ability to alienate purchased digital content and the ever-strengthening copyright protection environment, ordinary users of digital content in a networked society are increasingly constricted in their capability to participate in cultural meaning-making processes.

Below I provide a summary and conclusion of this study. I then suggest policy recommendations with regard to adopting a digital first sale doctrine. Finally, I briefly discuss future directions for study and reiterate the notion that cultural democracy provides a normative framework that guides us to better accomplish copyright law's ultimate goal—to benefit the public and promote cultural progress.

SUMMARY AND CONCLUSION

This study sought to better understand the first sale doctrine and to examine the applicability of the doctrine to digital goods. The ultimate conclusion of this study is there is a need for adopting a digital first sale doctrine and for reestablishing consumers' rights to digital content in the digital age.

This dissertation has critically examined the historical development and implications of the first sale doctrine and has explored its applicability to digital copyrighted works, especially within the context of the use of ebooks. In agreement with Serra (2013), its motivation has been that the first sale doctrine can be an important component of insuring distribution rights for digital information products.

Throughout the dissertation, I have argued that the current licensing scheme and the ever-strengthening copyright protection run against the original intent of copyright legislation. The concern is that we are increasingly moving toward a society where "owning" cultural works is not allowed and users of digital creative works are simply becoming licensees locked in with restrictive agreements imposed by copyright holders. In addition, the current copyright law does not keep up with new ways in which digital content consumers interact with cultural works in their daily lives. There is little doubt that we need to update and revise copyright laws in order to reflect technological advances and the participatory culture. It is crucial for us to rethink the ultimate goal of copyright legislation and to modify the narrow economic paradigm guiding copyright interpretations. Ultimately, copyright legislation exists not to benefit the copyright holder but to benefit the entire public, creators as well as users.

Justifying a digital first sale doctrine, this study builds on democratic principles in connection with copyright theories. By doing so, this study aims to provide a theoretical foundation for adopting a digital first sale doctrine. In the digital age, secondary markets enabled by a digital first sale doctrine could bring about positive policy outcomes that include promoting market innovation, protecting consumer welfare and privacy, and

ensuring access to cultural works. The cultural democracy approach outlined in this dissertation justifies the application of the first sale doctrine to digital goods and provides a theoretical justification for restoring the balance between copyright holders and users of copyrighted material.

It seems clear that content creation industries are moving quickly to control the disposition of their products in the digital marketplaces (Gautam, 2014). As Gautam (2014) argues, the *Kirtsaeng* case may further incentivize content industries, particularly in this case publishers, to rely on digital formats in an attempt to take advantage of a digital distribution model that gives them more control over their creative expressions. Both Amazon and Apple are trying build an online marketplace where customers can exchange preowned digital goods, although they have yet to announce specific details to the public (Streitfeld, 2013). Both tech-giants acquired patents for the exchange system that allows users to trade used digital goods, making sure that only one copy of a digital good can exist at any one moment. As of now, one thing is clear: Amazon and Apple are working to enter the digital secondary market, but to control it.

Recently, ReDigi attempted to build a digital secondary market, introducing new technological and legal approaches. However, as discussed in previous chapters, the ReDigi court rejected ReDigi's business model, saying that ReDigi's service constituted a copyright infringement by making a new copy when transferring digital music files. Digital copies cannot be accessed or transferred without making temporary copies (Perzanowski & Schultz, 2014). For the past several decades, Congress has wrestled with the conflict over temporary copies made onto one's computer. As shown in Chapter 1,

Congress introduced the "essential step defense" for owners of computer programs (Siy, 2013), and Section 117 of Copyright Act deals with the defense,[81] but this provision does not address RAM copies of non-computer programs, which is problematic given that in our daily lives we necessarily create numerous temporary RAM copies on a near constant basis. The legal status of these reproductions is still unclear. Technological and legislative approaches discussed in this chapter suggest that it is time for Congress to comprehensively consider those policy options to make appropriate changes to copyright laws.

Previous chapters demonstrated that a digital first sale doctrine could provide a way to restore balance in the age of copyright maximalization. Simply creating a digital first sale doctrine cannot resolve the two issues of the legality of temporary copies and restrictive licensing regimes. The "essential step defense" should be widely applied to digital transactions so that purchasers or sellers of digital goods need not worry about infringing a copyright holder's reproduction right. In addition, legislative efforts to limit restrictive licensing agreements are needed to prevent copyright holders from eroding and restricting digital content consumers' rights in the digital age. Resolving these two problems in connection with a digital first sale doctrine would be the first step toward

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81 Section 117 of Copyright Act says: "it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided: (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful." Section 512 of Copyright Act applies the essential step defense to service providers.

restoring the skewed balance of interest between copyright holders and users of digital content.

One premise of this dissertation is that the ultimate beneficiary of copyright legislation should be the public or the larger society: "Copyright exists not to enrich authors and artists but to benefit the public" (McIntyre, 2014, p. 9). The current imbalance between copyright holders and users of copyrighted material should be corrected. In restoring a balance to the public's interest and that of copyright holders, cultural democracy can provide a theoretical ground by giving more importance to ordinary citizens' self-determination and individual liberty with regard to creative works. Jensen (1995) noted, "No growth comes without change, and change rarely comes without uncertainty, and uncertainty almost always sparks fear" (p. 286). For some people, legalizing the resale of digital goods may come as a threat. Resorting to the click-wrap licensing scheme, copyright holders and online distributors have disregarded digital content consumers' rights (Gautam, 2014).

Over the past few decades, our society has witnessed an exponential increase in cultural participation by users of digital goods, enabled by the development of digital technologies and the Internet. This so-called participatory culture can engender tremendous opportunities for our society in terms of building an innovative and creative culture. And as discussed in the previous chapter, cultural democracy emphasizes the importance of ordinary users' participation in cultural meaning-making processes as a means of promoting progress at both individual and societal levels. In this approach, ordinary citizens cannot achieve self-determination if they do not have meaningful

opportunities to consider and reconsider various life choices and actions in the cultural domain. Digital technologies and the Internet have helped ordinary citizens participate in cultural meaning-making processes more than ever before, a shift enabled by technological developments that support people's participation in the cultural sphere as being equally as important as their participation in the political sphere is important in any democratic society.

I have argued that the history and challenges presented in the ebook environment can be illustrative of the problems facing the types of content that can enrich a democratic culture. The ecosystem surrounding the ebook market is still, considering the long history of books, in an early stage. Notwithstanding that relatively short history, a number of issues have been raised by various stakeholders over the past few years. Ebooks have the potential to facilitate innovation in the development of publishing and bookselling industries, and to expand access to our rich repositories of print material. However, in the licensing age, purchasing an ebook does not allow you to transfer the purchased ebook, preventing you from exerting your presumed rights that have been attached to a physical copy of copyrighted works. Given the importance of books in accomplishing social goals such as increased literacy and expanded access to information and knowledge, the evolution of the ebook ecosystem deserves policy considerations, particularly in consideration of the interests of consumers, and disadvantaged groups (OECD, 2012).

One question lawmakers, judges, and scholars have to ask themselves, when addressing copyright issues, is what the term "progress" –a word ensconced in the section

of the Constitution creating copyright—truly means (Tang, 2011). The first step to finding an answer to that question should be to start reframing the conventional understanding of copyright protection's presumed consequences. An incentive paradigm's narrow focus on economic efficiency needs to be supplemented by the notion of cultural democracy. From a cultural democracy perspective, cost-benefit precision is not the sole normative foundation undergirding copyright laws. Unlike an incentive paradigm, cultural democracy gives due weight to the realization of individuals' self-determination and liberty in the cultural sphere (Bracha & Syed, 2014). And this dissertation has demonstrated that the notion of cultural democracy can provide an alternative theoretical framework to accomplish copyright's goal of progress by encouraging ordinary individuals' active participation in cultural meaning-making processes.

Before I discuss policy recommendations with regard to a digital first sale doctrine, I briefly discuss other issues that need to be addressed to fully benefit from a digital first sale doctrine.

TWO HURDLES TO A VIABLE DIGITAL FIRST SALE DOCTRINE

Temporary Reproduction Issue

Recently, in the case of *Capitol Records, LLC v. ReDigi Inc*., the United States District Court for the Southern District of New York held that the first sale doctrine could not be applied to pre-owned digital music files because ReDigi's service infringed on Capitol Record's exclusive rights of reproduction and distribution. ReDigi's software

program allowed its users to upload and resell only lawfully purchased digital music files. If they extracted files from CDs or downloaded music files through peer-to-peer file sharing sites, they were ineligible to use the service. By using ReDigi's server, users were able to store their files for later listening or to resell them to other users. The court rejected ReDigi's technology that validated its users' music files to be eligible for sale, based on the conclusion that transferring digital works from users to ReDigi's server makes a new copy on the server's hard drive.

U.S. courts have treated temporary reproductions of digital works on one's computer as copies. Thus, virtually all activities through one's computer such as reading ebooks or listening to digital music end up making a copy of an original copy (Perzanowski & Schultz, 2011). The ReDigi court ruled:

> [A] ReDigi user owns the phonorecord that was created when she purchased and downloaded a song from iTunes to her hard disk. But to sell that song on ReDigi, she must produce a new phonorecord on the ReDigi server. Because it is therefore impossible for the user to sell her 'particular' phonorecord on ReDigi, the first sale statute cannot provide a defense…Here, ReDigi is not distributing such material items; rather it is distributing reproductions of the copyrighted code embedded in new material objects, namely, the ReDigi server in Arizona and its users' hard drives. The first sale defense does not cover this any more than it covered the sale of cassette recordings of vinyl records in a bygone era. (*Capitol Records, LLC v. ReDigi Inc*, 2013, p. 655)

There is no compelling reason to make a difference between digital content consumers and computer users. As Perzanowski and Schultz (2011) noted, "the alienability of digitally distributed works is just as deeply intertwined with reproduction as the resale of computer programs. These similarities suggest that the exhaustion principle should be applied consistently to both computer programs and other digitally distributed works" (p. 936).

However, as of now, the essential defensive maneuver that prevents computer program users from being subject to copyright liability is applied to no one other than computer program users. Thus, the benefit of adopting a digital first sale doctrine would be limited unless the temporary copying issue is solved. A digital first sale doctrine regime would work properly only when purchasing and reselling digital content do not infringe a copyright owner's reproduction right.

Restrictive Licensing Practices

The second major issue concerns restrictive licensing. The software industry has figured that using a shrink-wrap license can better protect their rights. And other content industries have followed this strategy. A shrink-wrap is one type of license that "gets its name from the fact that retail software packages are covered in plastic or cellophane 'shrinkwrap,' and some vendors…have written licenses that become effective as soon as the customer tears the wrapping from the package" (*ProCD, Inc. v. Zeidenberg*, 1996, p. 1449). Other forms of licenses include browse-wrap license and click-wrap license. A browse-wrap license is a licensing agreement that binds its users to its agreements when

they simply browse a website, while a click-wrap license agreement requires users who want to download and use digital content to click or check a box that includes an "I agree" or "Yes" icon. The Kindle Store Terms of Use could arguably be considered a browse-wrap agreement (Reis, 2015), given that once users browse Amazon Kindle Store's website they are bound to its licensing agreements.

By resorting to restrictive licensing agreements in conjunction with DRM, eretailers and copyright holders have bypassed the application of the first sale doctrine (Gautam, 2014).[82] By relying on restrictive licensing agreements, copyright holders have controlled downstream sales in the same way that the *Bobs-Merrill* court sought to foreclose in its ruling (McKenzie, 2013). In other words, copyright holders have dictated post-sale restrictions through licensing agreements, saying that their content is not sold but merely licensed. Given that licensing agreements are largely governed by contract laws, a digital first sale doctrine would have little to say when it came to the licensing regime. Therefore, even though we have a digital first sale doctrine, copyright holders can bypass its application by resorting to licensing agreements. Because the current first

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82 To maximize control over their creative works, copyright holders have used DRM technologies in conjunction with other measures such as licenses. As Gautam (2014) notes, "DRM and distribution via license are particularly problematic because the restrictions they impose on distributed copies are not constructed with potential unforeseen beneficial uses in mind. Accordingly, these strategies may act to hamper follow-on innovation, as well as preservation of access to existing innovations" (p. 757). As discussed in Chapter 4, the arrest of Dmitry Sklyarov boosted a controversy in regard to DRM and DMCA and helped the growth of digital rights movements (Postigo, 2012). The U.S. government had to confront a backlash from both digital content consumers and copyright activists as well as media reports that were unfavorable toward the U.S. government's approach to enforcing the DRM scheme. Another backlash that ultimately prompted the Recording Industry Association of America (RIAA) to stop its campaign targeting individual peer-to-peer file-sharers is also worth noting. As this dissertation discusses in Chapter 6, those consumer backlashes toward DRM technologies along with an ever-strengthening copyright trend warrant further investigation, given that those movements can guide copyright reform debates and subsequent legislative efforts.

sale doctrine is only applied to a copy "owner," licensees have no right to resell or rent out their copy (Mattioli, 2010). By giving only usage rights through licensing, rather than transferring ownership of copyrighted works, copyright holders can bypass the first sale doctrine (Gautam, 2014; Mattioli, 2010). Legal scholars have criticized this legal loophole (Gautam, 2014; McKenzie, 2013; Reis, 2015). They argue it should be tackled given that such a loophole severely restricts consumers' expectations with regard to their purchased copyrighted works and runs afoul of the economic rationale of the first sale doctrine (Gautam, 2014; Mattioli, 2010).

In effect, the content creation industries have performed a superior bait-and-switch feat. The entertainment and content industries generating a false rhetoric regarding licenses, one that is inconsistent with the Copyright Act. Carver (2010), for example, points out that licensing refers to "transferring perpetual possession of a copy but retaining title to the copy" and that the invented notion is "both incoherent and not found in the Copyright Act" (p. 1954). Given that licensing involves a transferring of possession of a particular copy permanently, he further suggests that when courts determine a title to a copy has been transferred they have to consider whether the transferee has perpetual possession. Radin (2013) also criticized the current licensing regime, specifically for how multi-page End User Licensing Agreements (EULAs) prevent people from having any real choice about their legal rights rather than simply agreeing to a standard boilerplate and signing away their rights in order to use software or digital content. Radin (2013) viewed the no-choice boilerplate problematic because it undermines the very idea of contracts. She pointed out that 1) consumers are uninformed

because they are usually unlikely to read and understand licensing agreements, 2) they are sometimes not aware of the existence of the boilerplate, which is problematic in terms of giving consent, 3) their inability to modify the specific terms weakens consent (Radin, 2013, p. 29). Fully addressing the issue of restrictive licensing agreements requires a discussion of theories of contract law, particularly from the perspective of contractual theories of autonomy and consumer welfare (Radin, 2013). Based on the examination of user policies and agreements adopted by three major social media platforms, Stein (2013) concludes that "the terms and conditions of the platforms on which contribute content, conduct exchanges, socialize, communicate, and otherwise interact" should be questioned in connection with their ability to further user participation (p. 368).

Tackling theories of contract law goes beyond the scope of this dissertation. One thing is clear though: a digital first sale doctrine cannot properly function unless reasonable and acceptable terms are applied when dealing with the scope and boundaries on how users can interact with their digital goods as well as the need to fully inform users and provide them the ability to exercise more leverage when given a chance to negotiate terms. It is equally important that more attention be directed toward how the streaming model relates to users' freedom to interact with cultural works.

POLICY RECOMMENDATION: A TECHNOLOGY-BASED LEGISLATIVE APPROACH

It is often said that digital goods are different from physical goods in two ways. First, it is difficult and often costly to copy physically-contained copyrighted works,

whereas duplicating digital works can be done with only a few clicks of a mouse. In general, copying physical goods requires time, some material investment, and effort. Another difference between physical goods and digital goods is degradation. Physical works degrade over time and use. Digital goods, however, are not known to degrade over time given proper storage. Those against a digital first sale doctrine have relied on these two differences between physical and digital content.

The next section of this chapter addresses a legislative approach and espouses a position that is cognizant of the technological change that is (now) endemic to intellectual property. More specifically, this chapter argues that in the process of updating and revising the first sale doctrine provision, the following policy recommendations need to be fully considered: the so-called "forward-and-delete" technology, an aging digital file system, the digital resale royalty scheme, and provisions for library exemptions.

"Forward-and-Delete" Technology

In 2001, largely due to concerns about the ease of copying and distributing digital copyrighted works, in the DMCA Section 104 Report, the U.S. Copyright Office recommended Congress not adopt a digital first sale doctrine and to take a "wait-and-see" approach (Hess, 2013). At that time, a "forward-and-delete" technology was discussed as a potential solution to the concern of multiple copying by users. Such technology would allow the original purchaser of a copy to transfer that copy to another user without leaving a copy on his or her computer. Arguably, this technology "is the legal equivalent of giving, lending, or selling a material copy in a fixed form" (Sikich, 2011, p. 22). The

Copyright Office was not sure whether or not an effective "forward-and-delete" technology existed at the time of the report. Since then, however, digital technologies have developed and clearly such technology exists. In fact, ReDigi recently implemented a "forward-and-delete" technology.

The presence of "forward-and-delete" technology itself has little bearing on expanding the first sale doctrine to digital property. Thus, adoption of the technology (i.e., "forward-and-delete" system) as a default system is recommended for the proper functioning of a digital first sale doctrine. This should be done as an amendment to the Copyright Act. Legislation can provide a positive means to address implementation of that technology, thereby allowing copyright holders to be less concerned with the existence of multiple copies after transactions of digital content enter secondary markets. Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003 included a provision that legalizes the resale of digital goods under the implementation of a "forward-and-delete" scheme and limited the effectiveness of the click-wrap licensing scheme by adding the following provision: "When a digital work is distributed to the public subject to nonnegotiable license terms, such terms shall not be enforceable under the common laws or statutes of any State to the extent that they restrict or limit any of the limitations on exclusive rights under this title" (H.R. 1066, 2003). Arguably, House Bill 1066 and similar proposals did not elicit enough support from copyright holders by giving favor to consumers without paying enough attention to placate content industries' concerns about potential revenue losses that may be caused by unique challenges associated with people's use of digital goods.

Aging File System

Even assuming that some type of "forward-and-delete" technology became a default condition for the resale of digital goods, copyright holders are still likely to reject a digital first sale doctrine. This is largely because digital works do not degrade over time. A "forward-and-delete" technology can be a potential solution to thwarting the existence of multiple copies of one original copy. However, if one copy does not degrade over time, digital content consumers can use that copy for as long as they want, which obviates the need to purchase a new copy, whereas physical copies deteriorate over time and use. Some people still consider this non-degradable feature of digital content significant, thereby artificially making digital works degradable has been discussed (Perzanowski & Schultz, 2015). In 2011, IBM filed a patent for an "Aging File System."[83] According to the patent application submitted by IBM, "there is a need for a new kind of filing system that *automatically* and *selectively* ages files contained therein such that the files themselves are caused to age with time and are not maintained in their originally stored state" ("Aging File System," 2011, p. 1, emphasis added).[84] Although discussing specific details of that particular technology is beyond the scope of this study, one thing is clear: technological developments can make digital files automatically degradable through a wide range of parameters, including the number of times a copy is made. Arguably, as Hess (2013) argues, "[u]sing the ease of digital copying as an

83 Aging File System, U.S. Patent No. 20110282838.

84 See https://www.google.com/patents/US20110282838

element in this aging system may prove to be the most effective balance of public access and control for creative incentive in digital property currently available" (p. 2009).

Implementing a technology that makes digital files degradable can be considered a political compromise in that it can potentially serve both the interests of copyright owners and users of copyrighted works. In the physical world, the degradability of physical works has played a role in supporting the free alienability of physical goods. By bringing degradability into digital goods, this technological approach opens up room to play out arguments for expanding the first sale doctrine to digital goods. Opponents of a digital first sale doctrine have argued that the first sale doctrine should not be applied to digital goods because they are not degradable, but implementing an aging file system to digital works clearly positions proponents of a digital first sale doctrine for refuting such arguments.

Making digital copies degradable can be implemented in connection with the "forward-and-delete" system. Arguably, this approach could satisfy the copyright owner because the degradability of digital goods can cover some potential economic losses copyright owners might otherwise be unable to avoid. No matter what types of DRMs are adopted by copyright owners, it will always be possible for some users to circumvent DRMs and relevant technological barriers. Particularly, under the "forward-and-delete" system, some tech-savvy users may break the "forward-and-delete" system and make other copies. In this case, the degradability of digital goods can compensate for some potential economic losses.

Adopting a technological approach like the so-called "forward-and-delete" technology for a digital first sale doctrine has garnered some attention from both academia and Congress (Graham, 2002). The benefits and consequences of making digital copies degradable have not received adequate attention and deserves further investigation.

One notable downside of these technological approaches is the considerable administrative costs. Both technological approaches discussed in this chapter require intermediaries that control the implementation and operation of the proposed technological systems. Pertinent stakeholders, policymakers, and the public will have to hold numerous Congressional hearings to figure out best practices in any case. In particular, when it comes to making digital files degradable, determining the appropriate number of copies before degradation is not an easy task and will require rigorous market research (Hess, 2013). In addition, whether temporary copies made on one's RAM and other parts of a computer should be considered when counting the "number" of copies remains unanswered (Hess, 2013).

Significance of Legislative Approach

These technological approaches need to be accompanied by legislative approaches. When amending the Copyright Act, lawmakers need to fully consider technological affordances. Changing the Copyright Act to include digital copies in its first sale doctrine provision would be the simplest way to adopt a digital first sale doctrine. However, this option is not feasible because many people, particularly copyright

holders, believe that the differences between physical and digital copies are significant when it comes to expanding the first sale doctrine to digital works. Those who have an extreme viewpoint about the need for a digital first sale doctrine may argue that these differences are negligible and there is no compelling reason not to expand the first sale doctrine. Technological approaches, such as the "forward-and-delete" technology and an aging file system, stand between the two extremes: One ignores differences between physical and digital copies and including digital copies in the first sale doctrine; the other is simply not adopting a digital first sale doctrine. A statutory amendment that implements technological compromises would be desirable when balancing competing interests between the public and copyright owners, given that this approach lies between the two extremes. These approaches entail a combination of technological and legislative approaches. In other words, implementing a "forward-and-delete" system or an aging file system would require relevant legislations. Given that these technological compromises are subject to innovation and obsolescence, keeping up with new technological affordances might be needed in terms of updating specific rules that specify the application of legislation. Without pertinent legislative changes, the mere existence of these technological affordances would mean next to nothing in terms of implementing a digital first sale doctrine.

A Digital Resale Royalty

There is another pragmatic approach that does not necessarily involve the above noted technological approaches to a digital first sale. For example, a resale royalty could

re-balance copyright holders' interests and users' interests in a harmonious way by serving both parties' interest. A digital resale royalty "[remits] a portion of the proceeds from any digital resale to copyright holders and expressly [permits] intermediary copying necessary to effectuate resales" (Serra, 2013, p. 1801). Serra (2013) argues that the royalty collection scheme, which is currently applied to digital performances of sound recordings under the Digital Performance Right in the Sound Recordings Act of 1995, could be applied to digital resales. In addition, Chapter 10 of the Copyright Act ("Digital Audio Recording Devices and Media") addresses individuals' use of digital musical recordings and includes sections that address the procedure of royalty payments with regard to digital audio recording devices. These existing royalty payment schemes could provide a framework for creating a digital first sale doctrine that allows secondary markets for digital works.[85]

Adopting a digital resale royalty may be a political compromise that aims to serve both the interests of copyright holders and the users of copyrighted works. Setting aside practical issues to be solved, this type of compromise looks legislatively feasible, considering the fact that Congress resolved the tension between then-new cable systems and broadcast stations by adopting the compulsory licensing scheme in 1970s. To better

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85 In 1976, California passed the California Resale Royalty Act (Civil Code section 986) to collect and remit resale royalties for visual artists. In 2012, that law was struck down in the case of Estate of Graham v. Sotheby's, Inc. Puerto Rico enacted a similar legislation and the law is still in effect (Serra, 2013). Currently, there is no federal resale royalty law, but Congress has paid attention to the feasibility of implementing resale royalty. In the Visual Artists Rights Act of 1990 (VARA), "Congress granted certain moral rights to artists and directed the U.S. Copyright Office to compose a report exploring the feasibility of implementing resale royalty legislation at a later date" (Turner, 2012, p. 331).

protect the interest of consumers, more attention needs to be paid to various types of approaches.

No technological solutions can avoid any potential leakage points where people can bypass a technological component such as a "forward-and-delete" technology, in whole or in part. In this case, a digital resale royalty can compensate for some economic loss of copyright holders while allowing the resale of digital goods in the market. A digital resale royalty brings a new stream of income to copyright holders such as publishers and record labels while allowing consumers to sell or transfer their digital works by paying digital resale royalties. This legislative approach also entails considerable administrative costs, and a system should be designed that simplifies the process of royalty payments. As Serra (2013) notes, "Given the technology necessary to resell an electronic work and the small returns on a per work basis, there are not likely to be small resellers or individuals in the market hawking used e-books or individual MP3s" (p. 1795). Therefore, it is reasonable to have online resellers like ReDigi or eBay collect and remit digital resale royalties because those entities can benefit from economies of scale and copyright holders can easily police the resale of their copyrighted works. Alternatively, creating a nonprofit organization for collecting and distributing digital resale royalties could be considered (Serra, 2013). When it comes to the performance of digital recordings, SoundExhange, a nonprofit performance rights organization designated by the Copyright Royalty Board, collects and distributes royalties, administering the statutory license for the digital performance right. This model was introduced to the market in 2003 (Serra, 2013). Since its launch in 2003, SoundExchange

has distributed more than two billion dollars and, in 2014 alone, distributed approximately $773 million to recording artists and record labels.[86]

Exemptions for Libraries

As an ever-increasing proportion of Americans read ebooks and some publications are only available in digital format, more and more libraries are lending ebooks to their patrons. Concerning library ebook lending, there should be a special exception for digital works that parallels the provisions of Section 108 of Copyright Act. With physical books, a library may, because of the first sale doctrine, sell or otherwise dispose of its books, but this doctrine is not currently applied to ebooks. In this chapter, I have sketched technological and legislative approaches toward a digital first sale doctrine. For example, a "forward-and-delete" technology and an aging file technology can be applied to the library lending in the context of the entire publishing ecosystem. Fully considering these technological approaches is important because licensing agreements between libraries and publishers can be influenced by the types of technologies applied to ebook lending.

Libraries are struggling to deal with a publisher's ebook selling policies. In September 2012, then the American Library Association President Maureen Sullivan published an open letter:

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86 See http://www.soundexchange.com/pr/soundexchange-wraps-record-setting-year-with-773-million-in-payments-to-recording-artists-and-record-labels/ See also http://www.soundexchange.com/artist-copyright-owner/digital-royalties/

> It's a rare thing in a free market when a customer is refused the ability to buy a company's product and is told its money is "no good here."
>
> Surprisingly…libraries find themselves in just that position with purchasing ebooks from three of the largest publishers in the world. Simon & Schuster, Macmillan, and Penguin have been denying access to their ebooks for our nation's 112,000 libraries and roughly 169 million public library users…
>
> Let's be clear on what this means: If our libraries' digital bookshelves mirrored the *New York Times* fiction best-seller list, we would be missing *half* of our collection any given week due to these publishers' policies. The popular "Bared to You" and "The Glass Castle" are not available in libraries because libraries cannot purchase them at any price. Today's teens also will not find the digital copy of Judy Blume's seminal "Forever," nor today's blockbuster "Hunger Games" series. (American Library Association, 2012, para. 1-2)

The existence of digital secondary markets would resolve some of these problems. Thus, discussing and making some changes to the current restrictive licensing regime is important. In so doing, the technological approaches discussed in this chapter should be fully considered by publishers, libraries, intermediaries, policymakers, and even the public. And when it comes to a digital resale royalty, a special exception could be made to allow libraries to pay lower royalty rates to the copyright holder.

The Copyright Act includes a special exception for libraries and archives, given that libraries and archives play a critical role in preserving our cultural resources and promoting cultural progress. As discussed in Chapter 5, Congress recognized the need for

allowing special provisions for libraries, and as a result Section 108 permits libraries and archives to reproduce and distribute copyrighted material under certain conditions. However, that provision fails to reflect recent technological developments with regard to the use of digital media that have changed the ways in which people interact with cultural works. Of particular concern, when license terms apply, libraries and archives are not allowed to enjoy exemptions like Section 108 when license terms apply, and libraries are disadvantaged by restrictive licensing agreements imposed by publishers. Future discussions of copyright reform must fully consider the role that public libraries play in furthering democratic values in our society. Therefore, it is recommended that Congress adopt a provision that prevents publishers and copyright holders from imposing nonnegotiable licensing terms on libraries. The BALANCE Act mentioned earlier included the following provision: "When a digital work is distributed to the public subject to nonnegotiable license terms, such terms shall not be enforceable under the common laws or statutes of any State to the extent that they restrict or limit any of the limitations on exclusive rights under this title" (H.R. 1066, 2003). This approach needs to be given renewed attention when special exemptions that help libraries fulfill their mission in the digital age are considered.

All in all, when discussing amending copyright laws in connection with a digital first sale doctrine, Congress should fully consider the technological environment surrounding an implementation of digital resale and weigh the interests of copyright owners against digital content consumers. As discussed in Chapter 4, actual user preferences and practices that relate to the issue of "materiality" need to be fully

considered in updating and revising copyright law in the digital age. The above mentioned compromise would be legislatively feasible in that it would seek to serve both the interests of copyright holders and copy owners. Although the law is not going to do anything on its own, once enacted, the law can govern people's behaviors and influence social norms, markets, and the architecture. Thus, the legislative approach in conjunctions with other approaches, such as technological solutions presented in this dissertation, can be a powerful tool in accomplishing an intended consequence. It is important to note that the existence of a well-functioning non-profit organization like SoundExchange suggests that managing a digital resale royalty is a feasible policy option.

SUGGESTIONS FOR FUTURE RESEARCH

Two hurdles blocking the path to a digital first sale doctrine discussed earlier in this chapter deserve wider public attention and deeper academic investigation. Those problems relate not only to the discussion of expanding the first sale doctrine to digital works but also to copyright issues in general. The scope of the rights that digital content consumers enjoy is very likely to be determined by the ways in which those problems are discussed and resolved by pertinent stakeholders, scholars, policymakers and the public. As long as media and communication scholars are concerned about how legitimate competing interests between copyright holders and users of copyrighted works should be balanced in the digital age, then more research is needed to address those problems. Legal

scholarship has paid some attention to those two problems, mainly focusing on the need to revise the Copyright Act. Other issues also need vigorous attention.

In challenging the thesis that the tangible nature of a copy is a key element to the first sale doctrine, media and communication scholarship may contribute by tackling the concept of "materiality" and by examining how the concept relates to copyright laws. Criticizing copyright law's artificial distinction between a creative work and a physical copy of that copyrighted work, Burk (2013) argues that "[n]ew materialism might offer copyright a path out of such unsustainable distinctions…[by] recognizing the primacy of matter in the development of creative expression" (p. 2).

Different disciplinary interests have addressed the concept of the materiality (Dourish & Mazmanian, 2011; Gillespie, Boczkowski, & Foot, 2014). Understanding the centrality of matter has become increasingly important for scholars in the humanities and science and technology studies (Burk, 2013), and this is particularly true in the case of "'digital humanities,' where the digitization of traditional expressive forms, or the development of new digital expressive forms, fundamentally implicates the connectivity of the virtual and the material" (Burk, 2013, p. 1). However, both communication and legal scholarship have paid scant attention to the concept of "materiality" in the context of copyright law. Given that copyright law's distinction "between the immaterial 'work' and its fixation in a physical 'copy'" has been increasingly challenged (Burk, 2013, p. 1), the concept of materiality needs to be better understood in the digital context, perhaps leading to more vigorous protection of parallel rights with digital content that are taken for granted with "physical" content. Conducting an extensive study of how different

disciplines define "materiality" in their own fashion would be an important starting point for better understanding the term and its implications.

Digital technology has presented a host of challenges to copyright laws. One notable example of these challenges is the distinction between material and immaterial goods. The ReDigi court said that "the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce" (p. 655). The ReDigi court held that because digital music files are not material items, the first sale defense cannot be expanded to digital works. However, this approach has its flaws. The first sale doctrine is applied to CDs and DVDs, and digital music files are nothing more than downloaded songs stored on a consumer's hard drive. Songs embedded in tangible CDs are no different from songs stored on a hard drive in that both consist of a series of ones and zeros. Hard drives are also tangible and can wear down over time. In other words, hard drives are also tangible media and subject to degradation. Moreover, people use these formats in ways that emulate the ways they have interacted with other highly material forms over the years. Long (2008) offers a good example:

> Therefore, "to argue that there can be no such thing as a used digital media market merely because electronic transfers would deliver a potentially pristine copy of that work is to ignore the obvious: if a compact disc in good working condition is transferred in a used tangible goods market, the pristine underlying digital file which resides on that disc is delivered to the new user. Thus, it does not appear to be, on the surface, a valid argument that digital media is somehow less deserving of first sale protection merely because the ones and zeros residing on the hard

drive do not deteriorate, since the ones and zeros of the exact same song on a compact disc, which does receive first sale protection, do not deteriorate either. (Long, 2008, p. 1193)

Another interesting area that deserves more academic exploration is the power of advocates in support of consumer rights. Awareness comes before any meaningful changes. In that regard, copyright reform movements are expected to take more active and strategic approaches for enhanced public awareness to revise copyright laws. Copyright activists have not always succeeded at reforming copyright law. However, at times their efforts have provided significant impetus for reshaping the debate surrounding intellectual property, including the rights of copyright holders. Online advocacy groups that support copyright reform have continually made their voices heard with the help of the Internet and communication networks (Herman, 2013; Postigo, 2012). The establishment of public interest groups, such as the Electronic Frontier Foundation, Public Knowledge, and Creative Commons, demonstrates the general public's growing awareness with regard to intellectual property issues. As noted earlier, after being confronted with unprecedented online protests, U.S. legislators withdrew their support, at least temporarily, for the following two proposed bills: "To promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property, and for other purposes" (H. R. 3261) and "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011" (S. 968).[87] It is very unlikely

[87] The two bills were commonly known as SOPA and PIPA. In 2011, SOPA was introduced in the House, and PIPA was introduced in the Senate.

that the current version of those two bills could be enacted without their undergoing significant changes. This outcry demonstrates ways copyright activism can play a role in shaping the terrain of copyright law.

As legislative history has shown, adopting a digital first sale doctrine is unlikely to be successful unless the public's support is presented. In that regard, the significance of digital rights movements becomes ever more imperative.[88] Social movements surrounding intellectual property are worthy of deeper exploration in the digital context. Given judicial and legislative failures to act on copyright issues, these movements become increasingly imperative today to better protect copyright's democratic values.

Thus far, little attention has been paid to the question of who is shaping the debate over a digital first sale doctrine in Congress or elsewhere. What is needed is a thorough examination of power relations at play surrounding legislative efforts to expand the first sale doctrine to digital goods. Such an examination is needed to accomplish the goal of adopting a digital first sale doctrine. In doing so, researchers would do well to give

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88 As noted earlier, in the case of *Used Soft GmbH v. Oracle International Corp*. (2012), the Court of Justice of the European Union held that consumers are allowed to resell their used software licenses. Although digital consumer rights movements over a digital first sale doctrine are in their early stages, by pointing to the UsedSoft precedent, the Federation of German Consumer Organizations (VZVB) has taken up this issue and sued Valve, an American entertainment software company, for not allowing its customers to resell their digital games (Plafke, 2013). A regional court in Berlin, Germany, dismissed VZVB's lawsuit against Valve (Tach, 2014). As Brustein (2015) aptly notes, "unlike the established economics of secondhand CDs, DVDs, and game discs, the mechanics of selling used digital media are murky at best and not clearly legal" (para. 3). That being said, efforts to establish consumers' rights to resell and transfer their digital content have been continued. For example, a startup called Tom Kabinet tried to open a secondary market for ebooks in the Netherlands (Meyer, 2014). In June 2015, Tom Kabinet launched a membership-supported used ebook store in the Netherlands, enabling its members to "donate" their ebooks through the site. As a compensation for their donations, members are allowed to read other ebooks. New business models surrounding the usage of digital content may benefit when coupled with digital consumer rights groups.

serious attention to recent European and Canadian court decisions that favor consumers' rights, including the resale of digital works, as well as consumer rights groups' movements occurring in those regions.

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